

**Protection of Internally Displaced People
from Arbitrary Displacement: The
Development of the Right not to be
Arbitrarily Displaced**

by

Naziye Dirikgil

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ABSTRACT

This thesis examines the development of the right not to be arbitrarily displaced, which is a fundamental right for Internally Displaced Persons (IDPs). The thesis examines such development under both national and international law, especially since the launch of the Guiding Principles on Internal Displacement in 1998. The main argument of the thesis is that the right not to be arbitrarily displaced has evolved to become a free-standing human right while contributing substantially to existing articles of International Humanitarian Law and International Human Rights Law. This right derives from existing provisions of these regimes of international law concerning forced displacement and enhances these provisions by filling gaps and contributing to areas that have previously not been addressed by these regimes. The thesis shows that this right is not merely repetitive but rather comprises a critical and innovative right that can perform a major role towards protecting IDPs from arbitrary acts of displacement. A significant contribution of this right is that it addresses the pre-displacement phase, but is not limited to that, and also enhances protection from arbitrary acts during displacement, if displacement is unavoidable.

The thesis also demonstrates that the capacity of this right to perform a critical role for IDP protection has to a large extent been made possible by developments at the national law level. The empirical analysis conducted shows that certain countries have developed more ambitious and comprehensive national legal frameworks on IDP rights, and this process has led to recognition of the right not to be arbitrarily displaced in their domestic frameworks. There is a critical number of countries that now explicitly recognise this right and even have created policy-making frameworks that promote the applicability of this right. The thesis argues that this process is not the same for all states in this category since there may be different paths towards the greater recognition and applicability of this right, but nevertheless these different paths all contribute to the strengthening of understanding of states regarding their obligations towards the prevention of displacement. Despite the existence of implementation issues on this right, such impediments do not derive from the right itself but are rather linked to political problems and instability of the country concerned. The thesis demonstrates all this process with two case studies, Colombia and Kenya, which are illustrative of how the right not to be arbitrarily displaced has evolved through different legal and policy paths. The two case studies reveal the importance of a

national-driven approach for the recognition and application of this right, and provide valuable insights on how this right can potentially evolve across different national contexts. The thesis concludes that the national-driven approach can comprise a more realistic and pragmatic way for enhancing the right not to be arbitrarily displaced, and overcoming the problems normally associated with sovereignty.

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Abbreviations

African Commission on Human and Peoples' Rights: ACmHPR

African Court on Human and Peoples' Rights: AfCHPR

American Convention on Human Rights: ACHR

European Convention on Human Rights: ECHR

Human Rights Committee: HRC

Inter-American Court of Human Rights: IACrHR

International Committee of the Red Cross: ICRC

Internally Displaced Peoples: IDPs

International Humanitarian Law: IHL

International Human Rights Law: IHRL

International Criminal Tribunal for the Former Yugoslavia: ICTY

International Criminal Tribunal for Rwanda: ICTR

International Criminal Court: ICC

International Criminal Law: ICL

International Covenant on Civil and Political Rights: ICCPR

Committee on Economic, Social and Cultural Rights: CESCR

The United Nations: UN

UN General Assembly: UNGA

UN Security Council: UNSC

United Nations High Commissioner for Refugees: UNHCR

CHAPTER 1: INTRODUCTION AND RATIONALE FOR THE THESIS

The global crisis of internal displacement has emerged as one of the great human tragedies of our time and also as a challenging issue on the international agenda. Increasing numbers of internally displaced persons (IDPs) have been forced from their homes by armed conflicts, systematic violations of human rights, natural disasters or other traumatic events. Their plight poses a challenge of humanitarian, political and legal dimensions. In some cases, the degree of displacement may be so high that one can speak of whole societies becoming displaced. When a country falls into the disarray of displacement, neighbouring countries are affected too, and violence and instability often spread throughout entire regions. Internal displacement can constitute a threat to international peace and security, as has been recognised by the United Nations Security Council,¹ which means these circumstances call for regional and international responses, not only because of humanitarian and human rights concerns but also because of collective interest in regional stability, as well as and global peace and security.

This conundrum is evident in today's prominent and high profile IDP crisis. The dire situations of IDPs have often captured the attention of news reports, especially in Myanmar, Syria, the Democratic Republic of Congo (DRC) and Yemen. While giving the recent figures for IDPs (50.8 million), the BBC highlights that Covid-19 may add further risks to millions of already vulnerable people.² While observers and analysts are questioning why more people are fleeing home than ever before, the reasons given often relate to the devastating wars in Iraq and Syria causing many families to leave their communities, the instability caused by conflicts in the DRC, Yemen and South Sudan. What is striking in these accounts is the shift from the focus on refugees to IDPs and the highlighting of the plight of these people, which has for so long been ignored by the international community or has yet come to light. The term 'displaced people' is usually associated with refugees in the news but in recent years, the awareness of the existence of internal displacement is also reflected in articles that claim that 'most do not become refugees' and that 'more than half of all displaced people

¹ UNSC also confirms that IDPs play a significant role to the contribution of maintenance and promotion of international peace and security and they should be an important component of any comprehensive strategy to resolve conflict and build peace. See S/RES/2535 (14 July 2020), 'Maintenance of international peace and security' p.2 available at: [http://undocs.org/en/S/RES/2535\(2020\)](http://undocs.org/en/S/RES/2535(2020))

² Official website of BBC News, 'Record 50.8 million internally displaced, IDMC report says', available at: <https://www.bbc.co.uk/news/world-52450031> [last accessed 01.09.2020]

remain in their own country'.³ Calls to 'leave no one behind' and to find solutions for internal displacement have been made in the 2030 Agenda for Sustainable Development,⁴ adopted by all United Nations (UN) member states. This Agenda reveals the link between internal displacement and development, and suggests that states should therefore be including internal displacement when monitoring progress towards their development goals.

However, as awareness of the IDP problems increases, to fully address the drivers and impacts of displacement, and deliver the kind of policy making and operational actions needed to prevent and reduce displacement, we need to better understand the content of IDP rights and improve the ways of protecting them. This content has been shaped by what is known as the Guiding Principles on Internal Displacement (hereinafter the Guiding Principles), established in 1998 and presented by the Representative of the United Nations Secretary General on IDPs to the United Nations Commission on Human Rights.⁵ This set of rights was created with the purpose of emphasising fundamental human rights in order to protect IDPs in situations such as those described above. However, the Guiding Principles also innovated, with the creation of a critical right, right not to be arbitrarily displaced. In some countries, there has already been quite a substantial legal advance towards recognition, endorsement and application of this right, as this thesis will show in detail through the case studies of Colombia and Kenya.

1.1. How has academia studied the global issue of internal displacement and the international law surrounding the rights of IDPs?

The rights of IDPs have emerged as a substantial subject in the post-Cold War period, with academic legal studies paying particular attention to the challenges of addressing the rights of IDPs in the post-displacement phase, the difficulties of tackling the complex causes of

³ See official website of Guardian, 18 June 2020 available at: <https://www.theguardian.com/global-development/2020/jun/18/forcibly-displaced-now-account-for-1-of-humanity-un-report>; also see BBC News website, 24 September 2019, available at : <https://www.bbc.co.uk/news/world-49638793>

⁴ United Nations, Department of Economic and Social Affairs (2016), 'Transforming our world: the 2030 Agenda for Sustainable Development', available at: <https://sdgs.un.org/2030agenda>

⁵ Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 Addendum Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 ,11 February 1998. [hereafter the Guiding Principles]

displacement, and the need to devise universal and regional instruments that uphold and advance the rights of IDPs. While this thesis recognises the important contributions made by international law studies on the rights of IDPs, it seeks to address three important gaps in the relevant literature: (i) the pre-displacement phase, (ii) the content of the right not to be arbitrarily displaced, and (iii) the development of this right at the national level. In order to justify why these gaps exist, a discussion of how the thesis is positioned in the relevant literature first follows.

The starting point of this thesis is that any analysis of the rights of IDPs and their protection from internal displacement needs to begin with an evaluation of the major regimes of international law that are relevant to IDP rights. This thesis is about the duties of states and the rights of IDPs in the context of protection from internal displacement. In assessing relevant legal frameworks regarding protection from displacement, two branches of international law, International Humanitarian Law (IHL) and International Human Rights Law (IHRL), need to be analysed in order to clarify the existing international legal framework on the protection from displacement. The basic premise of this thesis is that both IHL and IHRL share a common interest in the protection of humanity, and none of these legal frameworks should be seen as an isolated system, even if the scope of their application, and their content, are different. One of the major causes of internal displacement is conflict, and IDPs caught in the middle of an armed conflict are entitled, as civilians, to the protection of IHL, and as citizens of their own state they are human rights holders, hence the subject of IHRL. It is therefore necessary to place the issue of IDP rights within the wider context of international law and to examine the interaction between IHL and IHRL. More specifically, this thesis examines how such key regimes of international law may complement each other, and aims to assess the greatest effective protection afforded to IDPs with the application of both bodies of law. As Gasser points out, 'human rights law and international humanitarian law are not identical bodies of law but complement each other and ultimately remain distinct.'⁶ Therefore, in respect of certain rights of IDPs' protection from displacement, more specific rules of IHL (i.e. rules concerning the prohibition of forced

⁶ Gasser, H.P. (2002), 'International humanitarian law and human rights law in non-international armed conflict: Joint venture or mutual exclusion?', *German Yearbook of International Law*, Vol. 45, Duncker & Humblot, Berlin, p. 162.

displacement) may be especially relevant for the interpretation of IDPs' right not to be arbitrarily displaced.⁷

Furthermore, the principal work from which this thesis is inspired is the report of 1998 by the Representative of the United Nations Secretary-General on the Human Rights of IDPs, Francis Deng, on the 'Legal aspects relating to the protection against arbitrary displacement'.⁸ The report specifically highlighted that it is necessary to discuss the legal norms relevant to the protection from displacement and to a right not to be arbitrarily displaced, in order to achieve a greater degree of comprehensiveness in the elaboration of the legal framework that relates to displacement.⁹ However, that report on arbitrary displacement remains the only one dedicated to IDPs' protection from acts of arbitrary displacement. While many scholars have focused on the guarantees concerning legal protection against specific phases of displacement, such as the situation of IDPs/refugees during displacement and return or specific types of displacement, such as displacement as a result of armed conflict, no comprehensive overview and analysis of the evolution of the right not to be arbitrarily displaced in both hard and soft law has been conducted since the late 1990s.

Studies of international protection norms for IDPs emerged in the 1990s, with the launch of the Guiding Principles in 1998, with four main research areas. First, some studies focused on the soft law nature of the Guiding Principles. Due to reservations regarding a legally binding instrument on IDP protection expressed by several governments, the appropriateness of a soft law approach to IDP protection is considered.¹⁰ Some authors argue that the use of a soft law approach has contributed to the internationalisation of IDP norms.¹¹ In this respect,

⁷ Complementarity approach was adopted by the Human Rights Committee, which stated, in its General Comment No. 31, that both spheres of law (IHL and IHRL) are complementary, not mutually exclusive. UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 11.

⁸ Report of the Representative of the Secretary-General Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1997/39, Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement, 11/02/1998, E/CN.4/1998/53/Add.1.

⁹ Ibid. para 1.

¹⁰ Kälin, W. (2001), 'How hard is soft law? The Guiding Principles on Internal Displacement and the need for a normative framework', *Brookings Institution-CUNY Project on Internal Displacement*; Bagshaw, S. (2005), 'Developing a normative framework for the protection of internally displaced persons', *Transnational*, New York.

¹¹ Orchard, P. (2010), 'Protection of internally displaced persons: Soft law as a norm-generating mechanism', *Review of International Studies*, 36(2), 281–303.

some studies examine the legal significance of the Guiding Principles as they gained substantial international acceptance by governments, international organisations, regional bodies and NGOs.¹² Some studies even take the discussion further and examine the customary nature of the Guiding Principles, as they are seen by the authors as largely a reflection of states' existing international legal obligations.¹³

The second area of research in the literature focuses on the international protection of IDPs and the responsibility of the international community for the protection of IDPs. In this regard, these studies focus on the institutional framework of protection for IDPs, and the roles of the United Nations High Commissioner for Refugees (UNHCR), International Committee of the Red Cross (ICRC) and the United Nations (UN), as well as providing an overview of the law applicable to situations of internal displacement.¹⁴ Great attention is placed on the international community's responsibility to provide protection to IDPs, especially with the concept of 'sovereignty as responsibility' developed by Francis Deng, first Special Representative of the UN Secretary-General for Internally Displaced Persons. Deng stated on many occasions that if a government is incapable of providing protection and assistance, then the international community should act, either on the invitation of the host country or with international consensus, to fill the vacuum.¹⁵ From then on, there has been increased academic attention to the concept of 'sovereignty as responsibility' in the context of IDP protection. Some examine the obligation on states to accept complementary humanitarian assistance from the international community in situations where the state is unable or unwilling to fulfil this responsibility;¹⁶ in the same vein, some have pointed out the change in the traditional understanding of sovereignty, and claimed that state sovereignty

¹² Cohen, R. (2004), 'The Guiding Principles on Internal Displacement: An innovation in international standard setting', *Global Governance*, 10, 459–480

¹³ Schmidt, P. (2004), 'The process and prospects for the U.N. guiding principles on internal displacement to become customary international law: a preliminary assessment', *Georgetown Journal of International Law*, Vol. 35, Issue 3.

¹⁴ Phuong, C. (2005), 'The international protection of internally displaced persons', *Cambridge University Press*, Cambridge; Furrer, M. (2005), 'The mandate of the International Committee of the Red Cross for the protection of internally displaced persons', *Refugee Survey Quarterly*, 24(3), 84–95; Cohen, R. (2006), 'Strengthening Protection of IDPs, The UN's Role', 7 *Geo. J. Int'l Aff.* 101; Freitas, R (2004), 'UNHCR's decision making on internally displaced persons' edited in Reinalda, B & Verbeek, B (2004), *Decision making within international organisations*, *Routledge*.

¹⁵ Commission on Human Rights (1993), 'Comprehensive study of the Representative of the Secretary-General on the human rights issues related to internally displaced persons', E/CN.4/1993/35, para.151; Deng, F (1996), 'Sovereignty as Responsibility: Conflict Management in Africa', *The Brookings Institution*, Washington.

¹⁶ Luopajarvi, K. (2003), 'Is there an obligation on states to accept international humanitarian assistance to internally displaced persons under international law?', *International Journal of Refugee Law*, 15(4), 678–714.

does not shield a state from legal or political responsibility for human rights violations.¹⁷ Indeed, the concept of 'sovereignty as responsibility' sparked academic debate around the historical connection between IDP protection and the 'Responsibility to Protect' (R2P) doctrine,¹⁸ and the question of what utility the latter offers the former,¹⁹ as well as the applicability of the R2P doctrine in the context of IDP protection, considering their differences in light of their ability to complement one another and ensure more comprehensive protection are examined.²⁰

Third, the regional protection of IDPs, especially in Africa, is another area explored in the academic literature. The adoption of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)²¹, the first ever legally binding regional convention, spurred interest in the Kampala Convention's application and its contribution to IDP protection norms in Africa and to international law in general. While some studies assess the implementation and effectiveness of the Kampala Convention,²² others explore the roles of the Organisation of African Union, the African Commission on Human and People's Rights and the African Court of Justice and Human Rights in protecting IDPs and ensuring compliance with the Kampala Convention.²³ Fourth,

¹⁷ Brown, B. (2003). 'Reconciling State Sovereignty and Protections for the Internally Displaced', in *Invisible Refugees: Internally-Displaced Persons and the New Understandings of Protection and Sovereignty*, at 21 (J. Williams ed., Pax International 2003); Deng, F (1996), 'Sovereignty as Responsibility: Conflict Management in Africa', *supra* note 15.

¹⁸ Anderson, J. (2013). 'Sovereignty as Responsibility: R2P and IDP Protection', *Public Policy and Governance Review*, Volume 4, Issue 2.

¹⁹ Rimmer, S. H. (2010), 'New issues in refugee research: Refugees, internally displaced persons and the 'responsibility to protect'', Research Paper No. 185, UNHCR, <http://www.unhcr.org/research/working/4b97b0909/refugees-internally-displaced-persons-responsibility-protect-dr-susan-harris.html>.

²⁰ Cohen, R. (2010), 'Reconciling R2P with IDP protection' in Davies, SE and Glanville, L (eds), *Protecting the displaced: Deepening the responsibility to protect*, *Martinus Nijhoff Publishers*, Leiden, 35–58; Mooney, E (2010), 'Something old, something new, something borrowed ... something blue? The protection potential of a marriage of concepts between R2P and IDP protection' in Davies, S E and Glanville, L (eds), *Protecting the displaced: Deepening the responsibility to protect*, *Martinus Nijhoff Publishers*, Leiden, 59–84.

²¹ African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009.

²² Maru, M T (2014), 'The Kampala Convention and its contributions to international law: Legal analyses and interpretations of the African Union Convention on the Protection and Assistance of Internally Displaced Persons', *Eleven International Publishing*, The Hague; Ojeda, S. (2010), 'The Kampala Convention on Internally Displaced Persons: Some international humanitarian law aspects', *Refugee Survey Quarterly*, 29(3), 58–66; Abebe, A. M. (2010), 'The African Union Convention on Internally Displaced Persons: Its codification background, scope, and enforcement challenges', *Refugee Survey Quarterly*, 29(3), 28–57; Abebe, A. M. (2017), 'The Emerging Law of Forced Displacement in Africa, Development and Implementation of the Kampala Convention on Internal Displacement', *Routledge*.

²³ Beyani, C. (2006), 'Recent developments: The elaboration of a legal framework for the protection of internally displaced persons in Africa', *Journal of African Law*, 50(2), 187–197; Jaksa, B. and Smith, J. (2008),

and compared to the above-mentioned research areas, some more recent works have explored the domestic application of the Guiding Principles. While academia has extensively focused on the international and regional dimensions of the protection of IDP rights, internal displacement continued to be seen as an essentially internal affair in many parts of the world. Kälin highlighted this issue with the need for a bottom-up approach to convincing states affected by internal displacement to incorporate the Guiding Principles into domestic law, in his report presented to the UNGA under his mandate as the Special Representative of the Secretary-General on the human rights of internally displaced persons.²⁴

Some of the few scholars who address the domestication of the Guiding Principles explore how national laws and policies on internal displacement have evolved and expanded, with discussions on the benefits and shortcomings of different models with reference to specific cases.²⁵ While all these works are valuable because they offer insights into the legal issues surrounding displacement and the need for enhanced legal protection, none of them addresses national laws and policies on internal displacement in a comprehensive analysis. Studies heavily focus either on displacement due to the conflict, excluding other causes of displacement such as natural disaster and development projects, or on specific rights of IDPs such as humanitarian assistance, the right to return and resettlement. The root causes of displacement that might trigger the displacement of people, and are therefore critical for the prevention of internal displacement, are not covered, and are only considered as an area to be examined for further study,²⁶ which is yet to be done in the academic literature.

In addition to these more developed areas of literature, there has also been an emerging and more specialised literature on the prevention of internal displacement, which is particularly central to the aims of this thesis. More specifically, as the focus of this thesis is

'Africa: From voluntary principles to binding standards', *Forced Migration Review*, GP10, 18–19; Murray, R (2005), 'Refugees and internally displaced persons and human rights: The African system', *Refugee Survey Quarterly*, 24(2), 56–66.

²⁴ UN General Assembly, Protection of and assistance to internally displaced persons: note / by the Secretary-General, 11 August 2010, A/65/282.

²⁵ Carr, S. (2009), 'From theory to practice: National and regional application of the Guiding Principles', *International Journal of Refugee Law*, 21(1), 34–47; Schrepfer, N. (2012), 'Addressing internal displacement through national laws and policies: A plea for a promising means of protection', *International Journal of Refugee Law*, 24(4), 667–691; Wyndham, J. (2006), 'A Developing Trend: Laws and Policies on Internal Displacement.' *Human Rights Brief* Vol.14, Issue.1, 7-12.

²⁶ For instance, Ferris argues that the extent to which the Guiding Principles have prevented arbitrary displacement is less clear. See Ferris, E. (2008), 'Assessing the impact of the Principles: An unfinished task', *Forced Migration Review*, GP10, 10–11.

the prevention of IDPs from arbitrary acts of displacement, four main studies are very relevant, as they cover some key aspects of the prevention of internal displacement. First, Stavropoulou's article on the 'right not to be displaced' examines the existing responses of IHRL to the various causes of displacement, and identifies the human rights that displacement violates.²⁷ Second, Morel's book explores in detail the approach in Stavropoulou's article and contributes to the general debate on the emergence of the human right not to be displaced.²⁸ Both of these studies contribute to the clarification of the international legal framework on the protection of people from displacement from a human rights law perspective. Third, Jacques's book examines the prohibition of forced displacement in times of war, and even though the objective of that study is not the pre-displacement phase, which is a major focus of this thesis, it offers an insight to the protection of displaced people in cases of forced displacement.²⁹ The last study is Proukaki's article examining an individual right to be protected from forced displacement that results from armed conflict.³⁰ These two studies contribute to the clarification of the international legal framework on the protection of people from displacement from a humanitarian law perspective. While all these studies enable one to draw valuable conclusions with regard to the state and applicability of IHL and IHRL in cases of forced displacement, still more research is needed in order to translate abstract principles of international law into concrete actions at the national level.

This thesis claims to have an added value compared to past research in the academic literature and seeks to address three important gaps in the relevant literature. First, it contributes to the analysis of the pre-displacement phase, which still remains under-theorised in existing IDP legal studies. None of the above-mentioned studies deals with the issue of prevention of displacement with a specific focus on IDPs. IDP-related issues are dealt with either along with refugees, or else with other categories of protected persons. Internal displacement often becomes a subject of research interest after displacement takes

²⁷ Stavropoulou, M. (1994), 'The Right not to be Displaced', *The American University Journal of International Law and Policy*, Vol. 9, No.3.

²⁸ Morel M. (2014), 'The Right not to be Displaced in International Law', *Intersentia*, Cambridge.

²⁹ Jacques, M. (2012), 'Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law', *Cambridge University Press*, Cambridge.

³⁰ Proukaki K. E. (2018), 'The Right Not to Be Displaced by Armed Conflict under International Law' in: Katselli E, ed. *Armed Conflict and Forcible Displacement Individual Rights under International Law*. Abingdon: Routledge, pp.1-46.

place; therefore analyses of state responsibilities for the prevention and early response to the causes of displacement are still lacking in the literature, an area this thesis aims to address in detail.

Second, IDP legal scholars have not studied in detail the content of the right not to be arbitrarily displaced, especially the content in the Guiding Principles, and its applicability in cases of arbitrary displacement. The existing literature on the prevention of forced displacement either focuses merely on people displaced as a result of armed conflict or provides the analysis of legal issues surrounding displacement from a specific type of international legal regime. This thesis aims to provide an analysis from the perspectives of both IHL and IHRL, as well as International Criminal Law (ICL), in order to consider internal displacement broadly. Indeed, the right not to be arbitrarily displaced imposes obligations on states in all causes of displacement that are included in the IDP definition. Thus, state responsibilities regarding the prevention of displacement for any reason are discussed in the chapters where different causes of displacement come within the scope of the discussion. In this way, this thesis addresses issues that are either not addressed, or only briefly dealt with, in previous academic works.

Third, international law scholars have been preoccupied with ground-breaking development in international instruments, but have nevertheless neglected how different states have devised their own distinct national approaches to IDP rights. This thesis aims to fill that scholarly gap and provide an insight on how international law influences the development of national IDP frameworks. For this reason, the developments in national IDP frameworks with respect to the recognition of the right not to be arbitrarily displaced are analysed since the adoption of the Guiding Principles in 1998. Furthermore, this thesis intends to take the recognition of the right not to be arbitrarily displaced forward, and to assess the practical application of this right with reference to specific cases.

To address these gaps, the analysis of the thesis is based on the central research question: to what extent has the IDPs' right not to be arbitrarily displaced been developed under national and international law?

Furthermore, the discussion evolves on the basis of the following sub-questions that help guide the discussion for each chapter.

- Who can be considered as an IDP, and what is the legal justification for providing specific international legal protection to IDPs? (Chapter 2)
- To what extent is the right not to be arbitrarily displaced addressed in international law, and are relevant IHL and IHRL provisions sufficient to tackle IDP-related issues of forced displacement? (Chapter 3)
- Can the right not to be arbitrarily displaced be considered as a free-standing right? (Chapter 4)
- To what extent have national IDP laws and policies addressed the right not to be arbitrarily displaced? (Chapter 5)

To address the central research question, this thesis draws on both secondary and primary sources. The secondary sources used mainly include bodies of literature that help provide the academic context for the study of the evolution of the right not to be arbitrarily displaced. First, this thesis draws from literature on refugee rights in order to understand displacement-related issues, as well as how movement-related rights are protected under international regimes. Second, the literature on IHL also comprises a significant part of the academic literature discussed, because such works help explain how civilians are protected in situations of internal and international armed conflict, which also concern IDPs as civilians under IHL. Third, the literature on IHRL is also very relevant because it deals with movement-related rights and provides insights to understand the applicability of freedom of movement when human rights are violated. Fourth, the thesis uses the literature on the protection of IDPs that specifically discusses protection of IDP rights and helps provide an understanding of how to justify the protection of IDPs rights under existing international law.

The analysis of primary sources also comprises an important part of the research carried out in this thesis. Such analysis can be classified as theoretical and qualitative legal research, and aims at identifying, examining, describing and clarifying existing legal standards on the protection from displacement (chapter 3), as well as conducting normative-legal research involving the examination of legal change and improvement (chapter 4 and chapter 5). The analysis undertaken in this thesis examines important sources of IHL, including the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12

August 1949 (Fourth Geneva Convention), the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

Such instruments are critical for this thesis, since they aim to strengthen the protection of victims of international and non-international armed conflicts, and therefore also apply to certain crises faced by IDPs. When assessed in relation to internal displacement, the interpretation of the relevant provisions of the above-mentioned IHL sources, i.e. Article 49 of the Fourth Geneva Convention, Article 75 of the Protocol I and Article 17 of the Protocol II, was done with a particular focus on whether the protection afforded to civilians who are victims of war is sufficient to tackle displacement-related issues. This thesis also takes into account an authoritative study published in 2005 under the auspices of the International Committee of the Red Cross (ICRC) that identified 161 customary rules of IHL applicable in international and non-international armed conflicts, with a particular focus on Rule 129 concerning 'the acts of displacement'. In analysing this significant source of IHL, the thesis understands that, despite the fact that IDPs caught in the middle of an armed conflict are entitled, as civilians, to the protection of IHL, the extent of this protection will depend on various factors, including the characterisation of the conflict and the nature of their relationship with the state in whose territory they are located. For this reason, international case-law is also analysed; it provides useful insights into the interpretation of treaties. The case-law analysed in this thesis originates from the jurisprudence of the two ad hoc international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the jurisprudence of the International Criminal Court (ICC), regarding the individual criminal responsibility of perpetrators in cases of forced displacement.

In addition to these sources of IHL, the primary research of the thesis also entails assessing important sources of IHRL, including the International Covenant on Civil and Political Rights (ICCPR), the General Comments of human rights treaty bodies, including the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR), as well as Reports of the Special Rapporteur on the human rights of internally displaced

persons. The analysis of this thesis places particular significance on these primary sources because they perform a major role in interpreting and clarifying the content of movement-related human rights. Following the same logic, the thesis also focuses on the interpretation and clarification of specific content from the case-law of human rights bodies, including the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights, in order to examine how such content can apply to, and enhance protection from, displacement and the effects of displacement.

Apart from the legal instruments and case-law deriving from IHL and IHRL, the thesis also analyses resolutions adopted by the UN General Assembly (UNGA) and the UN Security Council (UNSC), as these reflect the attitudes of state parties to treaties and offer guidance to states on the interpretation of human rights and humanitarian law norms by helping them to clarify the specific content of these norms. Analysis of these instruments offers an important insight into the international environment that shapes the responsibilities and obligations of states, and conditions how these states will develop their own national responses towards enhancing protection from internal displacement. The international UN environment is also important because it can act as the trigger that, and in conjunction with IHL and IHRL, will push states to take greater steps towards developing IDP-related national legal frameworks, which can then gain a dynamic of their own, as this thesis will demonstrate in detail.

Furthermore, in order to examine how state's approach to the prevention of internal displacement, the thesis analyses national IDP-legislations along two levels. First, the thesis analyses the national legal framework of states in order to identify those states that have developed the most comprehensive legal frameworks towards recognising and addressing all phases and causes of displacement, while at the same time promoting the legal recognition of, and respect for, the right not to be arbitrarily displaced, with an explicit reference to this right. Second, the thesis analyses in detail the national laws and national policies of the two case studies, Colombia and Kenya, in order to assess the extent to which these two countries promote the applicability of the right not to be arbitrarily displaced. The thesis places emphasis on different sets of qualitative data that are available from these countries. For example, Colombia's case provides important sources in terms of constitutional decisions, whereas Kenya's case provides more extensive evidence in terms of

national policy-making. When assessing such variations in the empirical material, it is understood that countries may exhibit different approaches to recognising, endorsing and applying the right not to be arbitrarily displaced, with the primary sources analysis revealing a different balance of policy and legal instruments.

Finally, in order to examine the content of protection from arbitrary displacement and clarify possible grey areas in the existing international law in terms of IDP protection from displacement, the thesis examines the Guiding Principles with a particular focus on the principles relating to protection from displacement (Section II of the Guiding Principles). The Guiding Principles constitute a central source, and are examined in detail throughout this thesis, as it is important to clarify how the Guiding Principles restate and reinforce certain human rights, but also innovate to a substantial degree by establishing, or triggering the emergence of, the right not to be arbitrarily displaced. A close re-evaluation and re-reading of the Guiding Principles is therefore rendered as necessary for the aims of this thesis as it is important to carefully unpack how the right not to be arbitrarily displaced was initially defined and recognised, how it relates to other Principles of the Guiding Principles, but more critically, how it is a novel right that can help re-define the protection of IDPs and the delineation of their rights. For this purpose, this thesis also draws on examples from specific regional and sub-regional conventions, including Kampala Convention Article 4 (obligations of states parties relating to protection from internal displacement) and the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons.³¹ This is particularly the case in the Chapter 4, which examines the arbitrariness of the acts of displacement.

The thesis incorporates two case studies to illustrate how the right not to be arbitrarily displaced is adopted, promoted and applied at the national level. The two case studies, Kenya and Colombia, demonstrate how the national level is the critical stage in the application of this right. The selection of the case studies is linked to the broader empirical research conducted in this thesis, and which led to identifying the category of state that possesses the most comprehensive legal frameworks regarding all phases and causes of displacement, and at the same time promote legal recognition of, and respect for, the right

³¹ Protocol on the Protection and Assistance to Internally Displaced Persons, adopted on 30 December 2006 by the member states of the International Conference on the Great Lakes Region (hereinafter Great Lakes IDP Protocol), available at: <https://www.refworld.org/pdfid/52384fe44.pdf>

not to be arbitrarily displaced with an explicit reference to this right. Within this advanced group, states are likely to also demonstrate a stronger commitment not only in terms of recognition, but also towards promoting and applying the right not to be arbitrarily displaced. The two cases of Colombia and Kenya help examine whether this is the case, and to what extent.

To assess the extent of the applicability of this right within these case studies, the thesis examines the capacity of these countries' national IDP legislations at three levels. First, it analyses whether national legislation in Colombia and Kenya can create a legal framework upholding the rights of IDPs. Second, it examines the extent to which the two countries have taken positive steps towards preventing and minimising the adverse effects of displacement. Third, it examines whether the two countries have developed national policies on internal displacement with the aim of raising institutional awareness. The methodology of the case studies serves the aims of this thesis, because it helps show how each of these benchmarks can constitute a distinct legal process driving the development of the right not to be arbitrarily displaced and shaping the applicability of the right in the broader context of state responsibility. The case studies are therefore different to some extent, but this greatly contributes to the aims of this thesis, because such variation illustrates how there are different national paths towards the recognition and application of the right, and how the national-driven approach espoused in this thesis is not a one-dimensional legal process, but rather a flexible one. Such flexibility allows the right not to be arbitrarily displaced to be advanced through an array of legal and policy tools. Even if the initial trigger for such development may be deriving from a universal or regional treaty, the case studies show that the national-driven approach gains a dynamic of its own, and it is only through the use of two distinct case studies like Colombia and Kenya that we can see how such dynamics unfold.

1.2. Contributions

This thesis aspires to make the following contributions. First, it seeks to provide a deeper understanding of the pre-displacement phase, which is often neglected by studies on IDP law. The aim is to analyse certain types of displacement, and by extension the legal

obligations derived from such types. The thesis will show that the pre-displacement phase needs to be examined in greater detail, because IDP rights are interconnected and mutually reinforcing each other. Providing protection from displacement at the earliest stage possible is important because it leads to better protection of other rights, such as the right to shelter, the right to family reunification and freedom of movement. Provisions of IHRL and IHL that deal with movement-related rights in existing international law are not always about the post-displacement phase, since these provisions are also relevant to the root causes of displacement. These IHRL and IHL provisions potentially require legal obligations from states to take precautions before displacement happens. The thesis therefore provides a new perspective on internal displacement that invites a closer scrutiny of the issues and challenges that emerge when we study how internal displacement begins in the first place.

The second contribution concerns the right not to be arbitrarily displaced and its importance in rethinking IDP rights in general. It is argued that the right stands as an important and critical innovation, initially launched under the 1998 Guiding Principles and then gained a dynamic of its own across different national legal frameworks. Existing analysis of IDP rights have acknowledged the potential of this right, but this thesis delivers a more extensive, comprehensive and empirically driven examination of the right. Through this detailed analysis, we can gain a novel perspective on how the right not to be arbitrarily displaced innovates by explicitly identifying the prevention of arbitrary displacement, the conditions that can amount to an arbitrary act of displacement and the obligations required to prevent arbitrary displacement. Through this right, we can re-evaluate the broader framework of what is meant by IDP rights, and the multiple reasons for being an IDP.

The third contribution of this thesis is towards a new perspective of the role of national legal frameworks in protecting IDP rights. The thesis conducts an in-depth empirical research across different countries to broaden our understanding of how different national frameworks can recognise the right not to be arbitrarily displaced and even take positive steps in applying this right. The national driven approach to the right not to be arbitrarily displaced raises important questions on the general potential of national laws achieving a meaningful level of IDP protection that is not simply a response towards treaties and conventions. It is therefore demonstrated that national law can play a leading role in recognising and protecting IDP rights, even if there is a lack of continuous progress at the

international level. This contribution is significant because it shows how there are different paths to protecting IDP rights, and how these may lead to a critical mass of states that all converge towards some fundamental legal frameworks dealing with IDP rights. If we account for all these different national frameworks, we can gain a better understanding of how IDP rights are protected across the globe. This thesis examines the cases of Colombia and Kenya to show how the national driven approach leads to legal advancements across different national contexts. Overall, the thesis provides an insight on how the balance between national and international law can be reconsidered when it comes to IDP rights.

1.3. Thesis Outline

In order to address research question the thesis proceeds as follows. Chapter 2 provides a detailed background on what is an IDP, how humanitarian organisations and UN agencies respond to the protection and assistance needs of IDPs and how IDP rights are defined by the Guiding Principles. The chapter shows how the Guiding Principles reinstated fundamental human rights and tailored them towards the protection of IDPs but most importantly how the Guiding Principles innovated with the creation of the right not to be arbitrarily displaced. The chapter argues that this right is particularly critical for revealing the importance of the pre- displacement phase, especially as this right is not explicitly covered by the existing regimes of international law. Therefore, the chapter provides a new understanding of the central place of this right when considering how international law has developed in terms of protecting IDPs.

Chapter 3 takes this discussion further in order to specifically demonstrate how the right not to be arbitrarily displaced is linked to two fundamental regimes of international law, IHL and IHRL. Rather than associating IDP rights with one area of international law, as often suggested by the relevant literature, the chapter shows that the potential of the right not to be arbitrarily displaced becomes evident when we examine how it can build upon these two regimes. This right expands upon articles of IHL in terms of forced displacement while also reinstating IHRL with a specific focus on the right to freedom of movement. It can therefore act as a bridge between IHL and IHRL's movement-related articles while also filling gaps in those regimes in order to make them more responsive and specific to the pre-displacement

challenges, crisis and problems faced by IDPs. Chapter 3 then provides a new and broader perspective of international law for the right not to be arbitrarily displaced by placing it at the intersection of major areas of international law.

Chapter 4 examines the evolution of the right as a free-standing human right in terms of both general and specific eligibility criteria for a right to become a human right. The chapter argues that when we adopt a rights-based approach we can see how some general criteria needed for the identification of a new right are fulfilled, such as the rights it attributes to the right holders, the obligation imposed on the duty bearers, and the conditions of lawful restriction by the international community. This, however, is not sufficient for a free-standing human right, as it also needs to meet some specific criteria such as that the right should reflect a fundamentally important social value; the right should be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations; and the right should be consistent with, but not merely repetitive of, the existing body of international human rights law. The chapter finds that significant progress is also evident on these specific standards, concluding that the right not to be arbitrarily displaced is indeed attaining to a great degree the status of a concrete human right.

Chapter 5 discusses how this evolution is more advanced at the national level. The chapter engages in a detailed examination of national legal frameworks on IDPs to identify 34 countries that have developed national IDP legislation including pre-displacement phase. Within these analysed countries, some of them have established more comprehensive legal frameworks in terms of taking positive steps to mitigate the adverse effects of displacement, developing national legal framework upholding the rights of IDPs and developing national IDP policy. In order to understand why some countries achieve such a comprehensive framework, the chapter examines the cases of Colombia and Kenya. This discussion reveals that while these countries have different triggers leading to the enhancement of the right not the arbitrarily displaced in terms of explicit recognition and applicability, they both comprise cases where a national driven approach has met, and even exceeded, the standards of protection of IDPs from internal displacement that are enshrined in international law. The thesis then concludes with a justification of why the national driven approach has a dynamic of its own and can generate collectively, when evident across a

number of countries, major developments in how the right not to be arbitrarily displaced is recognised, defined and applied.

CHAPTER 2: INTERNALLY DISPLACED PERSONS AS A GLOBAL PROBLEM

2.1. Introduction

In beginning to analyse the development of the right not to be arbitrarily displaced at the national and international level, the thesis argues that the starting point is the formation of the Guiding Principles that comprise the main instrument in the recognition and protection of IDP rights. This instrument includes a number of principles, among which Principle 6 is the main focus of this thesis because it explicitly identifies the right not to be arbitrarily displaced for the first time. This chapter will discuss how IDP rights emerged in the international agenda and how the Guiding Principles became the universally accepted instrument in terms of defining and advancing the provisions of international law that are central to IDP protection. To a large extent, the Guiding Principles reinstated existing provisions and made them relevant and applicable to IDP rights specifically, but at the same time, the instrument also innovated by creating a new right, namely the right not to be arbitrarily displaced. The main argument in this chapter is that the development of this right was initiated in a context of international law; therefore, the initial phase of the right is very much framed at the international level. However, as Chapter 5 of the thesis will show, some states gradually formulated more advanced and comprehensive national frameworks in how this right can be recognised and implemented.

In this chapter the following points will be discussed under the context of IDPs, namely: the concept of IDPs, the definition of IDPs, the contribution of IDP definition, how IDPs' specific needs are addressed with the relevant legal norms of international law, the legal nature of the Guiding Principles, and how humanitarian organisations and UN agencies respond to the protection and assistance needs of IDPs.

2.2. The Concept of Internally Displaced Persons

The formation of the Guiding Principles in 1998 was a result of the gradual acknowledgement of the significant implications of internal displacement for the international community. When one considers the concept of IDPs, it becomes apparent

that the global crisis of internal displacement has emerged as one of the great human tragedies of our time and as a challenging issue on the international agenda. Increasing numbers of IDPs have been forced from their homes by armed conflicts, systematic violations of human rights, natural disasters or other traumatic events. Their plight poses a challenge of humanitarian, political and legal dimensions. In some cases, the degree of displacement may be so high that one can speak of whole societies becoming displaced. When a country falls into disarray, surrounding countries are affected as well and violence and instability often spread through entire regions. The situation of internal displacement can constitute a threat to international peace and security. The former UN Secretary-General, Kofi Annan, stated that internal displacement has created an unprecedented challenge for the international community, that is, to find ways to respond to what is essentially an internal crisis and to provide a comprehensive response that brings together the humanitarian, human rights and development components of the UN.³²

In 1998, for the first time, the international community published a world count of internally displaced people.³³ This recording effort, now prolonged into the maintenance of a database accessible on the World Wide Web,³⁴ reflects the growing awareness that these uprooted people represent a problem for states, international organisations and nongovernmental organisations. It has further been reported by the Internal Displacement Monitoring Centre (IDMC) that in the world today there exist almost 50.8 million people internally displaced as a result of violent conflict and human rights violations, including major cases like Iraq, Sudan, Syria and Democratic Republic of Congo, as well as natural disasters, mostly floods and tropical storms. Each year, such conditions create more IDPs than the previous year. For instance, 3.4 million new displacements were recorded in 2019, the highest annual figure since 2012 in 135 countries, with notable cases such as China, Philippines, India and Yemen.³⁵

³² Cohen, R., & Deng, F. M. (1998). 'Masses in flight: the global crisis of internal displacement' Washington, D.C.: Brookings Institution Press, Preface.

³³ Hampton, J. (1998), 'Internally Displaced Persons: A Global Survey', *Earthscan Publications Ltd*, London.

³⁴ see Internal Displacement Monitoring Centre (IDMC) <http://www.internal-displacement.org>

³⁵ IDMC, Internal Displacement Index 2020 Report, available at: <https://www.internal-displacement.org/publications/internal-displacement-index-2020-report> [accessed 25 September 2020]

Internal displacement can rarely be categorized as having only one or two distinct causes. Usually, there are multiple, overlapping, and interrelated reasons explaining displacement. Many may think of displacement as a temporary problem that disappears upon the resettlement of the displaced. On the contrary, it is often a long-term phenomenon that disrupts the lives of not only the individuals and families concerned but also of whole communities. Whatever the cause of their displacement, the key issues which make IDPs of interest to the international community are their lack of assistance and protection from their own government.

The international community's recognition of the magnitude of the crisis and the urgent need for action led the Secretary-General of the UN to appoint a representative on Internally Displaced Persons. It has now been some twenty years since the issue of internal displacement was placed on the international agenda and recognised as a legitimate matter of international concern with the Guiding Principles in 1998. Although not a binding instrument, the Guiding Principles restate the existing norms of human rights and humanitarian law that are relevant to the internally displaced. Their aim is to provide practical guidance to all phases of displacement – before, during and after the displacement – with a role in addressing the plight of IDPs. The Guiding Principles is the only international instrument that specifically deals with the problem of IDPs. It has also been the basis for regional conventions. By drawing on the Guiding Principles, the Kampala Convention also deals with the IDP problems at the regional level. The Kampala Convention is the first binding regional instrument, which comprehensively addresses all types, causes and consequences of internal displacement. Finally, as Chapter 5 will demonstrate, the Guiding Principles also formed the basis for a number of national frameworks concerning IDP rights, especially because this international instrument became the catalyst for the emergence of national laws and policies that began to recognise and address the broader issues concerning IDP protection.

2.3. Framing a Definition of IDPs

Before delving into how an IDP right can be recognised and protected, it is first important to consider the very definition of what IDPs are, and how such definition was shaped by the

Guiding Principles. Ever since the plight of IDPs has come to the attention of governments and international organisations it has been necessary to define who can be regarded as internally displaced. A definition would be useful for reviewing the numerous relevant norms that are applicable to IDPs and identifying the existing gaps in the protection of IDPs. As Beyani points out, to embark on the task of examining and providing international legal protection to IDPs, a working definition of IDPs is necessary to determine the basis of their entitlement to protection.³⁶ Agreement over a definition of IDPs would facilitate the gathering of statistical data and the evaluation of the specific needs of IDPs, and thus serve operational purposes in the field.

Cohen & Deng note there are two distinctive features in framing the definition: movement is 'coerced or involuntary' and the population affected remain within their national borders.³⁷ Thus, it is the 'coercion' behind the internal displacement that impels their movement, causing subjection to human rights violations and lack of protection. However, due to the complex nature of internal displacement, it is difficult to decide what should be included in the definition. When attempting to draw up a definition of IDPs, the refugee definition obviously offers some guidance. For instance, the definition of 'refugee' was expanded in the 1969 Organisation of African Unity (OAU) Convention³⁸ and the 1984 Cartagena Declaration on Refugees³⁹ in order to cover a wider range of situations besides the definition in the 1951 Refugee Convention⁴⁰ and to emphasise the causes of displacement. In addition to containing the element of 'well-founded fear of being

³⁶ Beyani, C. (1994), 'Internally Displaced Persons in International Law', Oxford, p. 22. In the light of current events, this is being developed into a book on 'State responsibility for internally displaced persons'.

³⁷ Cohen, R., & Deng, F. M. (1998). Masses in flight, *supra* note 30, p.16.

³⁸ Article 1(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa: The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

³⁹ Part III para 3 of the Cartagena Declaration on Refugees: To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

⁴⁰ Convention and Protocol Relating to the Status of Refugees, Geneva, 28 July 1951.

persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'⁴¹ (as stated in the 1951 Refugee Convention), the Cartagena Declaration includes the elements of generalized violence, foreign aggression, internal conflicts and massive violation of human rights.

However, some situations leading to internal displacement are specific to IDPs and have not been discussed with regard to the refugee concept even after the latter was expanded. Unlike refugee status, in the IDPs concept the emphasis is on the humanitarian approach rather than a legalistic one, although the refugee definitions would be useful as a standard of comparison.⁴²

A first attempt at a definition was made by the Special Representative on IDPs and in his analytical report IDPs are defined as 'persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country.'⁴³ However, some elements of this definition are not always characteristic of contemporary internal displacement of populations and some factors are overlooked. As Cohen and Deng note, 'if the term "internally displaced" refers only to those forced to leave their homes "suddenly or unexpectedly" or "in large numbers", many serious cases of internal displacement will be excluded.'⁴⁴ For instance, the situation of IDPs in Colombia has showed that IDPs do not always flee in large numbers. As documented in the report of the Special Representative on IDPs⁴⁵, as a result of paramilitary activities people first flee to a nearby town in order to find safety and still go back to their farms during the day for economic purposes. The decision of going further and leaving their property depends on the degree of violence. People in Colombia often flee in small numbers and in absolute silence in order to make themselves less conspicuous, while in Iraq, Kurds were forced to flee by their government over the duration of twenty-year period that did not fall within the scope of the above mentioning definition.

⁴¹ Ibid. Article 1 A (2).

⁴² Deng, F. M. (1995). 'The International Protection of the Internally Displaced'. *International Journal of Refugee Law*, Volume 7, p.74.

⁴³ Commission on Human Rights (1992). 'Analytical Report of the Secretary-General on Internally Displaced Persons', E/CN.4/1992/23, United Nations, para.17. (Analytical Report)

⁴⁴ Cohen, R., & Deng, F. M. (1998). 'Masses in flight', *supra* note 32, p.17.

⁴⁵ Addendum to the Report of the Secretary-General on the Human Rights of Internally Displaced Persons, Profiles in Displacement: Colombia (1994). E/CN.4/1995/50/Add.1, para.14.

As previously mentioned, the root causes of displacement are varied and complex. Persons uprooted by natural disasters may need special protection. They are included in the definition because in some natural disasters, discrimination against some certain ethnic or political groups can be observed. The principle of non-discrimination is firmly rooted in international law. IHRL rules set forth the principle of equality and prohibit discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.⁴⁶ Humanitarian law addresses the issue of equal treatment and non-discrimination in several provisions.⁴⁷ However, an explicit prohibition of discrimination against IDPs because of their being displaced does not exist in IHRL. Article 7 UDHR, Article 2 (2) CESC, Articles 2 (1) and 26 CCPR, and other human rights treaties stress that it is not only discrimination based on race, colour, sex, language, religion, national origin, and similar reasons that is prohibited, but also discrimination based on 'other status.' This last term, which was intended to be interpreted broadly, arguably covers the status of those who are internally displaced. The Guiding Principles contribute to the clarification of the prohibition of discrimination against IDPs because of their being displaced by explicitly recognising IDPs' protection against discrimination.⁴⁸ For instance, In the 1980s, the Ethiopian government forcibly relocated large numbers of Tigreans as it regarded them as political opponents, and this occurred at a time when Ethiopia was ravaged by drought and famine.⁴⁹ Natural disaster seemed as a pretext for displacement of political opponents. Even if the element of discrimination against IDPs does not characterise forced displacement in cases of natural disasters, persons uprooted by natural disasters have common types of vulnerability and often end up facing the problem of discrimination either from the government or the host community. After visiting the tsunami-affected Asian region, Kälin noted that regardless of the underlying reasons for their displacement, persons forced to leave their homes have common types of vulnerability.⁵⁰

⁴⁶ See Article 7 UDHR; Article 2 (2) CESC; Articles 2 (1) and 26 CCPR; Article 24 ACHR and Article 3 AfCHPR.

⁴⁷ See common Article 3 of the four Geneva Conventions ; Article 27(3) Geneva Convention IV; Article 75 Protocol I, and Articles 2(1) and 4(1) Protocol II.

⁴⁸ Principle 1 of the Guiding Principles

⁴⁹ Cohen, R., & Deng, F. M. (1998). 'Masses in flight', *supra* note 32, p.16.

⁵⁰ Protection of Internally Displaced Persons in Situations of Natural Disasters: A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons Walter Kälin, 27 February to 5 March 2005 (Geneva: Office of the United Nations High Commissioner for Human Rights, 2005), p. 9.

Another situation that needs to be considered in the definition is displacement caused by man-made disasters such as nuclear or chemical accidents, and development projects such as dam constructions. When people are displaced by such reasons, they generally receive assistance from their government but in some instances international protection is necessary because of systematic violation of human rights, neglect or persecution. In some cases, such as the Bayano Dam in Panama, projects are not decided in consultation with the local population or indigenous people⁵¹ even if they are the most affected group from the effects of displacement. Finally, in some cases such as the 1990's conflict in the former Yugoslavia, displacement is not just a result but the objective of the conflict: ethnic cleansing⁵² that has been practiced widely in different continents.

Usually there are multiple, overlapping and interrelated reasons explaining displacement and this shows the requirement for a comprehensive definition. The need for a holistic approach, and the explicit inclusion of a set of diverse causes of internal displacement in a definition, is also mentioned in the Oslo Declaration and Plan of Action.⁵³ Accounting for all such factors, the definition of IDPs was revised in 1998, and the introduction of the Guiding Principles define IDPs as

'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters and who have not crossed an internationally recognised State border.'⁵⁴

By locating the description of IDPs in their introductory section rather than in their main body, the Guiding Principles seek to highlight the descriptive and non-legal nature of the term 'internally displaced persons.' IDPs need not and cannot be granted a special legal status under international law comparable to refugee status. Rather, as human beings who

⁵¹ World Commission on Dams (2000), 'The Report of the World Commission on Dams, Dams and Development: A New Framework for Decision-Making', *Earthscan Publications Ltd*, p.111.

⁵² A United Nations Commission of Experts mandated to look into violations of international humanitarian law committed in the territory of the former Yugoslavia defined ethnic cleansing in its interim report S/25274 as "... rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."

⁵³ Partnership in Action (PARinAC) (1994). 'Oslo Declaration and Plan of Action', available at: <https://www.refworld.org/docid/3ae68f3d8.html> [last visited 03 August 2019], Recommendation 40.

⁵⁴ Guiding Principles on Internal Displacement, 1998, *supra* note 5, Introduction: Scope and Purpose, para.2.

are in a situation of vulnerability they are entitled to the enjoyment of all relevant guarantees of human rights and humanitarian law applicable to the citizens or habitual residents of the country concerned, including those that are of special relevance to them. This does not rule out the possibility of administrative measures such as registration on the domestic level to identify those who are displaced and need special assistance. However, lack of such registration would not deprive IDPs of their entitlements under human rights and humanitarian law. The explicit inclusion of non-exhaustive causes⁵⁵ of displacement in the IDP definition is based on the understanding that relevant cases of displacement would be the subject of special concern to the international community. As Cohen points out, the definition is the broadest definition in use at the international or regional level.⁵⁶ The challenge here was to devise a definition that is neither too narrow nor too broad in order to obtain a text that can cover a large array of situations but which is also a workable definition.

It can be observed from the definition of the Guiding Principles that the aim was to focus on the causes of displacement and IDPs' own state obligations because they still remain under the jurisdiction of their own state and this has important implications for the nature of protection that can be afforded to them. However, it can be argued that focusing on state responsibility was not the only aim that the definition wanted to address. The definition also has a more specific purpose, which is to determine the situations that require international action on behalf of IDPs. Such international action presupposes that states also need to adhere to international law rules. This requires a detailed analysis of international law rules dealing with forced internal displacement to understand how IDPs are protected under international standards, which will be fully shown in Chapter 3 with a particular focus on the international legal grounds that shape the right not to be arbitrarily displaced.

⁵⁵ The list of reasons for displacement in the Guiding Principles is not exhaustive as indicated by the use of the words 'in particular'.

⁵⁶ Cohen, R. (2000). 'The Development of International Standards to Protect Internally Displaced Persons', cited in Bayefsky A.F. & Fitzpatrick (2000), 'Human Rights and Forced Displacement', *Kluwer Law International*, The Hague, p.82.

2.4. The Contribution of the IDP Definition in the Guiding Principles

The Guiding Principles' definition of IDPs has succeeded in drawing international awareness to a serious forced migration problem that should not be ignored. Therefore, as it will also be shown in Chapter 3, such definition contributes to linking the IDP right not to be arbitrarily displaced with central regimes of international law. Framing a definition is a critical step in developing an effective framework and comprehensive strategies for the protection and assistance of IDPs. The definition of an IDP represented an opportunity to provide an overview of displacement caused by both conflicts and disasters, including their scales, causes and patterns. In the past, government responses to crises of internal displacement had been notoriously weak and there were few national institutions to deal with such crises because there was no definition of IDPs to focus attention on a vulnerable group. Currently, increasing number of governments move to establish agencies for the displaced and to set up relief centres to protect and assist their needy displaced populations.⁵⁷

A closer look to the institutional approaches to the protection and assistance to IDPs reveals the contribution made by the Guiding Principles' framing of a definition of IDPs. With a clear definition, it is easy for humanitarian organisations to assess whether a person is an IDP. Among all the UN Agencies, the United Nations High Commissioner for Refugees (UNHCR) plays the broadest role in addressing the problems of IDPs. Indeed, the main function of the agency is to provide international protection and to seek permanent solutions for the problems of refugees.⁵⁸ These persons who are not refugees under the 1951 Convention are regrouped as 'other populations of concern' in UNHCR statistics.⁵⁹ UNGA has authorised UNHCR in the coordination of relief and resettlement operations of refugees and other displaced persons.⁶⁰ The notion of other displaced persons referred here to IDPs and since then the mandate has been extended to include IDPs. Within the Inter-Agency Standing

⁵⁷ For recent data of national laws and policies see IDMC Database at <https://www.globalprotectioncluster.org/global-database-on-idp-laws-and-policies/> [last accessed 29.09.2020]

⁵⁸ Article 1 of the Statute of the Office of the United Nations High Commissioner for Refugees.

⁵⁹ Hovy, B. (2004). 'Statistical Yearbook 2002: Trends in Displacement, Protection and Solutions'. *UNHCR*, Table I.1, pp.22-25.

⁶⁰ UNGA Resolution 2958(XXVII). '*Assistance to Sudanese Refugees Returning from Abroad*', para 2. available at :<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/269/88/IMG/NR026988.pdf?OpenElement>

Committee (IASC) system, UNHCR leads the protection cluster in conflict situations, where a response is needed for both refugees and persons who have been internally displaced.⁶¹

Moreover, as a responsible organisation for the promotion and respect of humanitarian law, the International Committee of the Red Cross (ICRC) has a well-developed protection capability and a mandate to operate in armed conflicts. The ICRC engages in a broad range of activities and its representatives extend protection on both sides of conflict situations and seek to reach those who other humanitarian organizations cannot reach because of hazardous conditions or political obstacles. Although it was previously reluctant to take up the issue of internal displacement, the ICRC no longer avoids using the term.⁶² As armed conflict is the most common cause of internal displacement, the ICRC has found it effective to consider IDPs as 'primary target group' for its activities.⁶³

Furthermore, the World Food Programme (WFP) has also become involved with IDPs and conducted a comprehensive review in order to better understand IDPs needs, and confirmed that IDPs have special needs that are different from those of others.⁶⁴ The United Nations Children's Fund (UNICEF) is another organisation that has become involved with IDPs to provide health care, education and water to children and women. Initially, UNICEF was dismissive of identifying the internally displaced as a category of persons in need; however, its growing involvement in emergency situations has gradually led to the development of policies for IDPs. UNICEF has acknowledged that many internally displaced children 'are amongst the most seriously unprotected of all children' and it has developed policies to promote the rights of displaced children and women to survival, protection and development.⁶⁵ IDPs have also vital health needs and the World Health Organization's (WHO) main role is to make rapid health assessment to special groups, and in 2000 the agency explicitly formulated for the first time some principles for action on behalf of the

⁶¹ UNHCR, 'Emergency Handbook', p.2, available at: <https://emergency.unhcr.org/> [last accessed 15.02.2021]

⁶² Phuong, C. (2005) 'The International Protection of Internally Displaced Persons', *supra* note 14, p.93.

⁶³ ICRC (2000). 'Internally displaced persons: The mandate and role of the International Committee of the Red Cross', International Review of the Red Cross, No. 838.

⁶⁴ World Food Programme (2000), 'WFP's IDP Review: WFP-Reaching People Situations of Displacement', available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/6C022D7BE2ED2E1EC1256DB1003739B2-wfp-displace-apr00.pdf> p.5.

⁶⁵ UNICEF (1998), 'UNICEF Position on Internally Displaced Persons (IDPs)', p.2.

internally displaced.⁶⁶ Finally, the International Organization for Migration (IOM) has been particularly active in providing transportation for IDPs who want to return home.

The UN Human Rights system has also begun to take steps to develop more rapid responses to humanitarian emergencies. In 1992, The Commission on Human Rights (replaced by the Human Rights Council) requested the Secretary-General to appoint a Special Representative on Internally Displaced Persons. In April 2004, the Commission on Human Rights called upon the Secretary-General to create a new mechanism to build on the work of the prior Representative and to bring a further focus on the human rights of IDPs. Accordingly, the name of the mandate has changed to the Special Rapporteur on the Human Rights of Internally Displaced Persons in order to evaluate existing legal protections and institutional machinery for IDPs.⁶⁷ The Representative of the Secretary-General on IDPs is the only position to focus exclusively on the problem of internal displacement and to address both protection and assistance, and the position has brought about a deeper understanding of IDPs' plight and needs.

Finally, the formulation of an IDP definition by the Guiding Principles has also contributed to the development of national laws and policies. If a clear and accurate definition is not provided, it will be far more difficult to assess whether a person is an IDP in the first place, and when that person ceases to be an IDP. For this reason, the importance of developing national legal frameworks including the definition of IDPs has been emphasized in different platforms such as the Special Representative on IDPs' reports to the General Assembly⁶⁸ and to the Commission on Human Rights.⁶⁹ The definition is also providing guidance on who should be considered as an IDP and it precludes national authorities or international actors to decide arbitrarily which group of people fall into this category. Some states might have a

⁶⁶ Phuong, C. (2005)., 'The International Protection of Internally Displaced Persons' *supra* note 14, p.98.

⁶⁷ See official website of the UN High Commissioner for Human Rights, 'Introduction to the mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons', available at: <https://www.ohchr.org/EN/Issues/IDPersons/Pages/Mandate.aspx> [Last accessed 17.02.2021]

⁶⁸ See, e.g., Report of the Special Representative of the Secretary-General on Internally Displaced Persons, 20-21, U.N. Doc. A/58/393, (Sept. 26, 2003).

⁶⁹ Specific Groups and Individuals: Mass Exoduses and Displaced Persons: Report of the Representative of the Secretary-General on internally displaced persons, 100, U.N. Doc. E/CN.4/2002/95, Deng, F. (Jan. 21, 2003); Specific Groups and Individuals: Mass Exoduses and Displaced Persons: Report of the Representative of the Secretary-General on Internally Displaced Persons, 69, U.N. Doc. E/CN.4/2003/86, (Jan. 21, 2003); Deng, F. (March 4, 2004); Specific Groups and Individuals: Mass Exoduses and Displaced Persons: Report of the Representative of the Secretary-General on Internally Displaced Persons, 19, U.N. Doc. E/CN.4/2004/77.

tendency not to include all causes of displacement in order to avoid showing the high number of IDPs in their territory. Therefore, the Guiding Principles provide the incentive for states to harmonise their definitions with that of the Guiding Principles, a process that shows how the latter triggers important developments in IDPs rights at the national level. The variety across such national framework is examined in detail in Chapter 5.

2.5. Coordination and Protection Issues

Despite the capacity of the Guiding Principles' definition of IDPs acting as the common reference point for many international organisations and national frameworks, certain limitations are evident. The orientation of these organisations towards the issues surrounding IDPs has some positive aspects, including greater recognition of the grave situations and problems faced by IDPs, the allocation of funding and resources for IDPs humanitarian needs, the placing of IDP issues on the agenda of these bodies, and the potential for these organisations to negotiate agreements to tackle IDP crises. At the same time, the existence of multiple organisations has caused a fragmentation of authority when it comes to the global governance of IDP issues.

The issue of IDP protection reveals exactly how different actors and organisations have different approaches when it comes to operationalising and applying the IDP definition. As mentioned above, a broad range of humanitarian, human rights and development organisations have begun to provide assistance to IDPs. However, the presence and operation of these organisations does not always mean that the protection of IDPs is sufficiently provided. Assistance and protection are inter-related but in some IDP cases protection aspects are overlooked because of the over-emphasis on material assistance. For example, Bosnian IDPs suffered from security and property issues because of the lack of priority to protection as contrasted with assistance efforts.⁷⁰

Before going in greater detail with regards to organisations' response to the protection of IDPs, it is important to first highlight what is meant by IDP protection. The IASC and the UNHCR reflect the understanding that protection covers a legal responsibility principally of

⁷⁰ Minear, L. (1994) 'Humanitarian Action in the Former Yugoslavia: The UN's Role, 1991-1993'. *Thomas J. Watson Jr. Institute for International Studies.*, p.25

the state and its agents, but also an activity that must be taken to ensure the enjoyment of rights.⁷¹ In this respect, the ICRC's definition of protection⁷² has adopted IASC's policy paper, which is also embraced by the humanitarian organisations in their activities to protect IDPs. Accordingly, protection for IDPs is described as follows: 'The concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual and the spirit of the relevant bodies of law (i.e. HR law, IHL, refugee law).'⁷³ Because humanitarian organisations display the tendency to emphasise the assistance dimension of their functions, greater attention is aimed to be given by the definition above to the human rights protection of IDPs. Therefore, it should be noted that this concept of IDP protection takes as a starting point that IDPs are right-holders and full respect for their rights is needed along with their humanitarian assistance needs.

Despite the possibility to developing a concise and focused concept of IDP protection such as the one described above, the actual practises of organisations do not always converge. The capacities of operational organisations and UN Human Rights agencies vary widely; however, none of them have developed the capacity to meet all the needs of IDPs. The weakness of inter-agency coordination for the protection of IDPs and a lack of clear institutional responsibility are drawbacks of the existing institutional frameworks. UNHCR has extended its activities to include IDP problems; however, this can happen when IDPs are found in the same areas as refugees and 'when it considers that this forms an integral part of a comprehensive solution to the refugee problem'.⁷⁴ Humanitarian actors have diversified their practices and their mandates but sometimes there is an overlap with the work of other actors, like NGOs, and sometimes none of the agencies shows the presence required for the protection of IDPs. It can be argued that there is no 'international accountability when an agency denies coverage to internally displaced populations.'⁷⁵ Different agencies have attempted to be involved in situations of internal displacement depending on their interest or their resources. This 'pick and choose approach' has led to short commitments but long-

⁷¹ UNHCR (2006), 'Handbook for the Protection of Internally Displaced Persons', p.7. available at: <https://www.unhcr.org/uk/protection/idps/4c2355229/handbook-protection-internally-displaced-persons.html>

⁷² ICRC (1999), 'Strengthening Protection in War', Third Workshop on Protection, Background paper, Chapter 1.

⁷³ IASC Policy Paper on the Protection of Internally Displaced Persons (1999), New York, p.4. available at: https://interagencystandingcommittee.org/system/files/legacy_files/protection_of_internally_displaced_persons_inter_agency_standing_committee_policy_paper_0.pdf

⁷⁴ Phuong, C. (2005)., 'The International Protection of Internally Displaced Persons' *supra* note 14, p.2.

⁷⁵ Cohen, R., & Deng, F. M. (1998). 'Masses in flight', *supra* note 32, p.159.

term solutions often remain unpredictable and unavailable. A final issue is the lack of training for humanitarian staff around the specific elements of IHL and IHRL applicable to IDPs, as well as training on the Guiding Principles. In order for staff to familiarise themselves with the legal instruments which can be used for the purpose of protection of, and assistance to IDPs, promoting the dissemination, recognition and use of the Guiding Principles in these humanitarian organisations is imperative.⁷⁶

The first Special Representative on IDPs proposed the establishment of a focal point on displaced people but there was a lack of political will from both governments and UN agencies because the creation of a new international organisation duplicated existing arrangements and costs would be substantial. However, as the numbers of IDPs increased constantly, there was a great need to develop strategies and methods by which IDP protection and assistance may be achieved. Such strategies were expected to concentrate within, and promoted by the existing UN system. To address the question of how the UN and the wider humanitarian system should provide assistance and protection to IDPs, the UN system has developed two approaches. The first one is the UN's cluster approach, and the second one is integration of IDP protection within UN Security Council (UNSC) Peacekeeping mandates.⁷⁷ Clusters are groups of humanitarian organisations, both UN and non-UN, in each of the main sectors of humanitarian action, i.e. water, health and logistics. They are designated by the IASC and have clear responsibilities for coordination. The cluster approach has now been used in over 30 countries since its application for the first time, following the 2005 earthquake in Pakistan. Even if the cluster approach does not constitute a reform leading to the establishment of a sole UN agency with an IDP mandate, it managed to address IDP-related gaps to some extent.

Despite divergences in the mandate of different organisations within and beyond the UN system, the Guiding Principles comprise the common framework used to initiate and determine the process of IDP protection, even though actual practices may vary. This means that the Guiding Principles operate as the international standard for initially recognising and

⁷⁶ See the Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, in accordance with Economic and Social Council resolution 2004/263 and Commission on Human Rights resolution 2005/46. U.N. Doc. A/61/276

⁷⁷ Orchard, P. (2019) 'Protecting the Internally Displaced: Rhetoric and Reality', *Routledge*, London, United Kingdom, p.113.

defining what IDP rights need to be protected, even though the ways this standard is interpreted may lead to different responses. In fact, the task of protection of IDP rights may take a much broader dimension when we see how it may be linked to questions of international peace and security.

2.6. The UN Security Council's Involvement in the Protection of IDPs

The central organisation in how the international community can respond to IDP crises is the UNSC. The UNSC plays an important role in determining the protection levels that can be provided to IDPs in crises, especially because of this organisation's central role in the UN system and in global governance overall. The UNSC's first thematic resolution on Protection of Civilians in Armed Conflict (UNSC resolution 1265) was adopted in 1999 and highlighted the 'particular vulnerability of IDPs.'⁷⁸ Since then, the protection of civilians, including IDPs, in armed conflict has become one of the central topics of the SC's work.⁷⁹ While the norms of IDP protection and assistance emerged with the adoption of the Guiding Principles, they needed to go through a process of legal implementation both within states and international organisations to establish the understanding of international practice towards the internally displaced. In this respect, the UNSC resolutions also contribute to this understanding.

In the context of IDP protection, the UNSC's engagement can be seen as a gradual familiarization with internal displacement in terms of the range of issues falling within the concept of protection and the possible UNSC actions to address them. This has been reflected by the President of the UNSC in the first presidential statement on the Protection of Civilians in 1999 as 'displacement, among other reasons, is a contributing factor to instability and further conflicts and a cause of large-scale human suffering.'⁸⁰ The language of the Report of the Secretary-General to the UNSC on the Protection of Civilians is also clear in calling for efforts to enhance the protection of civilians and the important role of

⁷⁸ S/RES/1265(1999) Protection of Civilians in Armed Conflict, p.1.

⁷⁹ For a detailed list of UNSC resolutions on Protection of Civilians see United Nations Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (2009), 'Protecting Civilians in the Context of UN Peacekeeping Operations Successes, Setbacks and Remaining Challenges', pp. 81-84.

⁸⁰ S/PRST/1999/6 (1999) on the Protection of Civilians in Armed Conflict, p.1.

these efforts in ensuring humanitarian assistance. The report states that the protection of civilians is a broad concept, encompassing protection against threats of physical violence, but also activities such as the facilitation of humanitarian access. In the same report, IDP-related issues are included with a specific mention of IDPs in the DRC.⁸¹ The report clearly states that issues related to IDPs might threaten the peace and security of the entire region, and recognises that access to humanitarian assistance is important for the survival of civilians.⁸²

After the first thematic resolution on Protection of Civilians in Armed Conflicts, resolution 1296⁸³ clearly showed how the UN now drew international attention to the crisis of internal displacement and the IDP's need for protection from the violations of human rights. There were three main reasons for this linkage between the need to address IDP issues and the UNSC's response to them. Firstly, the UNSC asserted that attacks on civilians are a direct threat to international peace and security, which establishes the link between the protection of civilians in armed conflict and the threat to international peace and security which is the subject of IHL, therefore authorising the UNSC to act under Chapter VII. Secondly, the UNSC affirmed its intention to provide adequate resources to peacekeeping missions to protect civilians under imminent threat of physical danger, which allows the involvement of UN peacekeeping forces in protecting civilians. Thirdly, the protection of civilians is integrated with the need to provide humanitarian assistance to IDPs, specifically referring to IDPs on several occasions in its resolutions, because the UNSC highlighted that IDPs are vulnerable to the threat of harassment or where their camps are vulnerable to infiltration by armed elements⁸⁴ and this situation becomes the subject of IHRL. When we look at such practices, we can see how IHL and IHRL interact and interplay as key regimes when IDP protection becomes the concern of the international community, as will be discussed in Chapter 3. The need for the protection of civilians and the facilitation of the delivery of humanitarian assistance to displaced people is repeated in several UNSC resolutions. Protection for the internally displaced can thus be said to mean measures that

⁸¹ S/1999/957 (1999) Report of The Secretary-General to the SC on the Protection of Civilians in Armed Conflict, para.15: 'The presence of combatants in internally displaced person and refugee camps can destabilize the situation in an entire region. The most striking example was the infiltration of refugee camps in the Democratic Republic of the Congo...'

⁸² Ibid, paras. 15 & 19.

⁸³ S/RES/1296(2000) Protection of Civilians in Armed Conflict.

⁸⁴ Ibid. para. 14, p.3.

ensure the provision of humanitarian assistance to encompass their protection. Hence, as part of its task of protection of civilians, it may be argued that the UNSC-authorised operations should be entitled to unrestricted humanitarian access to IDPs.

An illustrative examine of how the UNSC has addressed the protection needs of IDPs is the situation in the DRC. There were three main IDP-related topics highlighted in the UNSC resolutions on the DRC: the increase in the number of IDPs, unhindered access (including the distribution of humanitarian assistance) to IDPs, and the safe and voluntary return of IDPs. In total, 69 UNSC resolutions were adopted regarding the DRC, of which 26 pertained to IDPs and their need to access humanitarian aid, during the 20-year period from 1998 to 2018. Those 26 resolutions that refer to internal displacement clearly demonstrate how the UNSC expressed its concern with the increasing number of IDPs. Specifically, the UNSC was:

*“expressing deep concern regarding the increasing number of internally displaced persons in the DRC”;*⁸⁵

*“expressing deep concern regarding the very high number of internally displaced persons in the DRC”;*⁸⁶ and,

*“expressing deep concern regarding the recent surge in the number of internally displaced persons in the DRC”.*⁸⁷

The first mention of the increasing number of IDPs is made in 2012, in which year the upward trend in numbers was observed and continued to rise afterwards.⁸⁸ Most resolutions mention IDPs in conjunction with refugees, but these paragraphs refer solely to IDPs. This reflects the UNSC’s changing attitude to IDP issues and its tendency to address specifically the increasing number of IDPs because, as stated in UNSC resolution 1296, IDPs have a role in a durable peace.⁸⁹ In other words, the rapid increase in internal displacement can cause the humanitarian situation to deteriorate and, if left unaddressed, internal displacement will continue to threaten the DRC’s stability.

⁸⁵ S/RES/2076 (2012)

⁸⁶ S/RES/2211(2015), S/RES/2277 (2016), S/RES/2348 (2017).

⁸⁷ S/RES/2360 (2017).

⁸⁸For a detailed info see IDMC, Country Profiles- Democratic Republic of the Congo at <http://www.internal-displacement.org/countries/democratic-republic-of-the-congo>

⁸⁹ ‘UNSC expresses its concern on acts of violence directed against civilians, including IDPs, and recognizes the consequent impact of this has on durable peace’ S/RES/1296 p.1.

As can be seen from the resolutions cited above, the UNSC has a practice of reiterating key language of previous resolutions to highlight their importance. Thus, it repeatedly expresses concerns in terms of soaring numbers of IDPs, with only small changes in wording. It is also apparent that the UNSC has sought to address issues associated with humanitarian access and assistance. It started to address humanitarian access concerns with explicit reference to IDPs in 2012 and since then it has continued to include IDPs explicitly when referring to humanitarian assistance to civilians.

Overall, it can be assumed that the surge in the number of IDPs from 2012 onwards may have resulted in more emphasis on the protection needs of IDPs, as well as their deteriorating humanitarian situation. This leads to the need for a more effective response to the problems of IDPs, which has been provided by the UNSC. The question of IDP protection therefore remains open for the UNSC and other international organisations as the proposed interventions, measures and practices towards IDP protection may vary. Nevertheless, the Guiding Principles remain the common reference point for such actors when seeking to deliberate how the violation of IDP rights can be initially identified and what are the IDP rights that need to be protected.

2.7. IDPs as a Special Category of Concern

It derives from the discussion above that despite the advancements analysed above in recognising the needs of IDPs, and the central role of the Guiding Principles in such recognition, it needs to be clarified that there is no specific international legal regime for the protection of IDPs and clear institutional responsibility is still lacking. However, this does not mean that there are no international legal standards that apply to internal displacement. Like every other individual, an IDP benefits from general IHRL rules and if IDPs are caught in situations that are characterised as 'armed conflict' they also benefit from IHL rules. For instance, the primary need of IDPs is often physical safety, especially in armed conflicts. The protection of their physical safety and rights is defended under international human rights and humanitarian law because no specific legal instrument applies to the internally displaced. Certainly, this is a point of considerable debate within humanitarian as well as academic circles: if the particular rights cannot be granted, what is the point of having a

designated category? Phuong and Barutciski are of the view that identifying IDPs as a special category is an unfair and inappropriate privileging of a subset of internal human rights victims.⁹⁰ This is an understandable concern, however, the purpose of identifying the internally displaced is not to confer them a privileged status but to ensure that in a given situation their needs are addressed along with those of others. The reason for this, in most cases, is the existence of discrepancy in the treatment between IDPs and others, and it therefore become apparent that IDPs' needs are largely ignored while equal distribution of humanitarian assistance often is problematic for IDPs. For example, in Rwanda the UN highlighted the living conditions and nutritional status of IDPs, which was substantially worse than other civilian victims.⁹¹ Those who have been displaced and become homeless are in a more vulnerable situation than those who stay in their homes. Displacement leads to massive loss: not only of home, income, land or other forms of property, but also loss of cultural heritage, friendship and a sense of belonging to a particular place. A legal definition would give priority to a certain group and create different standards of treatment when all groups are in the same material condition, but the definition of IDPs is a descriptive rather than a legal. The aim of the IDP definition is also emphasized in the workshop report on the Kampala Convention, and is understood as a definition that does not to assign IDPs additional rights, but rather signals their vulnerabilities.⁹² It is also explicitly stated that being internally displaced does not confer a new legal status.⁹³

Nevertheless, Lee has argued that the legal synthesis between refugees and IDPs is possible. He supported this view by the removal of any differentiation between non-nationals and nationals from the human rights point of view. So, this would entail also the removal of differentiation between refugees and IDPs.⁹⁴ The basis of his argument resides in the idea that the requirement of border-crossing has lost its relevance in the post-Cold War era and

⁹⁰ Phuong, C. (2005), 'The International Protection of Internally Displaced Persons' *supra* note 14, p.80; Barutciski, M. (1998), 'Tensions between the refugee concept and the IDP debate' *Forced Migration Review*, 3, 11-14., p.13.

⁹¹ Cohen, R., & Deng, F. M. (1998). 'Masses in flight', *supra* note 32, p.27.

⁹² IDMC and Norwegian Refugee Council Workshop Report (2014), 'The national responsibility to protect internally displaced people: The Kampala Convention', available at: <https://www.internal-displacement.org/sites/default/files/publications/documents/201505-af-national-responsibility-to-protect-idps-kampala-convention-workshop-report-en.pdf>, p.6.

⁹³ *Ibid.*

⁹⁴ Lee, T. L. (1992), 'Legal Status of Internally Displaced Persons', *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 86 (April 1-4,) p.631.

that it must be dropped in order to give the international community the legal capacity to address the problem of internal displacement. However similar their plight may be, refugees and internally displaced persons cannot be given the same legal status, because they require protection that is different in nature.⁹⁵ Actually, this is a fundamental difference between the two groups: IDPs remain under the jurisdiction of their own state and responsibility to protect and assist them should not be entirely given to other states or international and regional organisations. In the case of refugees, protection is provided to persons who have lost the protection of their country, have left it and cannot maintain any territorial link with that country. In the case of IDPs, the protection required must remain a complementary protection that exists in parallel with national protection, unless national protection is not available. Therefore, this fundamental difference does not make a legal synthesis between refugees and IDPs feasible. The establishment of a separate legal definition of IDPs does not seem to be advisable either. As has been seen in the previous section, the root causes of internal displacement are varied: they include natural disasters, inter-state conflicts, intra-state conflicts, widespread human rights violations, development projects, internal strife and man-made disasters. If a formal legal definition is not comprehensive enough, a restrictive legal definition for IDPs would have the effect of excluding some groups of internally displaced from its scope. Flexibility is required and the legal definition might actually be counter-productive to engage in the construction of a comprehensive definition for IDPs.⁹⁶ According to the Special Representative on IDPs, some problems can sometimes be addressed without the need for a precise definition, and his position is that assistance should be given not according to the legal status of the persons concerned, but according to their needs.⁹⁷

Hathaway observed the problem of the legal definition of IDPs in terms of the principle of national sovereignty. He argued that if legal protection was afforded to IDPs, this would constitute a major challenge to the principle of national sovereignty.⁹⁸ Therefore, the same

⁹⁵ Ibid. pp. 631-32.

⁹⁶ Phuong, C. (2000). 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities', *Netherlands Quarterly of Human Rights*, Vol. 18/2, p.225.

⁹⁷ Deng, F.M. (1995) 'Dealing with the displaced: a challenge to the international community', *Global Governance '0*, Vol. 1, at p. 50.

⁹⁸ Proceedings of the Annual Meeting (American Society of International Law) ,Discussion. (1996). (Vol. 68 - Vol. 110) ,Vol.90, *Cambridge University Press*,p.562. 'if we are serious that we are now in a position to enter behind the wall of sovereignty, we ought not to privilege those who are displaced, effectively doing a

elements of that debate reappear when we envisage this time the creation of a separate legal regime for IDPs. Instead of creating a specific legal status, what is needed is merely to advocate for rights that the internally displaced already have as full citizens of their country: they are still entitled to receive protection from their government, in contrast to refugees who had to give up any claim to that protection by placing themselves under the international regime of protection. It is thus important to maintain a clear definition of IDPs, and be aware of the potential implications of the development of protection strategies for the internally displaced based on the Guiding Principles. Another important consequence of the analysis developed above is to draw a distinction between a formal legal definition and an operational one, which serve different purposes. A legal definition seeks to establish a rigid legal system of international protection for IDPs, whereas an operational definition is aimed at facilitating material assistance and protection measures on the ground. These different possibilities for defining IDPs remain compatible with the Guiding Principles' understanding of how IDPs and their rights can be recognised, showing how the Guiding Principles remain the common reference point for different protection strategies. The following section will discuss how a functional definition of IDPs can be interpreted when analysing their needs and rights.

2.8. An Overview of the Specific Needs of IDPs and their Rights under International Law

As previously mentioned, there is no specific form of legal protection that could be granted to IDPs, despite the development of a comprehensive definition of IDPs and their rights. However, there are some legal standards that apply to the situation of internal displacement both in IHRL and IHL. These legal standards are applicable to IDPs not for actually being IDPs but rather for being humans and civilians. The aim of highlighting the specific needs and rights of IDPs is to analyse how existing international law provides protection to them. An overview of relevant legal norms applicable to the situation of IDPs is given in terms of their broad range of needs. These include property-related needs, the need for personal documentation, and the need to maintain family, personal security,

disservice to those who are trapped in their own homes, and we ought simply to get about the business of enforcing international human rights law internally if we honestly believe that is a possibility.'

personal liberty and subsistence needs. The question of whether current international law provides adequate protection against forced displacement will be discussed thoroughly in Chapter 3, with a specific focus on IHL, IHRL and ICL.

Once it occurs, internal displacement brings about a set of circumstances that renders those affected highly vulnerable. Most obviously, displacement forces people to be cut off from their land, traditional livelihood and means of generating income. As one study underscored, displacement leads to ‘massive loss not only of commodities such as the home, income, land or other forms of property, but also of less tangible symbolic goods, such as cultural heritage, friendship and a sense of belonging to a particular place.’⁹⁹ In many cases IDPs suffer from a lack of sufficient housing, clothing, food and water. A range of particular needs should to be addressed immediately and national authorities have the primary duty for providing protection and assistance to IDPs.¹⁰⁰ According to the Committee on Economic, Social and Cultural Rights (CESCR) a minimum core obligation is one of the State Parties’ obligations.¹⁰¹ Paragraph 10 of the General Comment includes the Committee’s view of the minimum core obligation, which is ensuring minimum essential levels of support for each right, with states obliged to ensure the satisfaction of this very least level and to take necessary steps to ensure the maximum available resources.¹⁰² However, it is difficult to decide what constitutes minimum essential levels in some cases of IDPs. Their needs are interrelated and urgent. For instance, addressing subsistence needs such as food, shelter or health services and addressing physical safety cannot be separated. The respect for one right may be essential to achieving another and all categories of rights reinforce each other. The difficulty of the determination of a minimum core is also stated by the South African Constitution Court in the Grootboom case, where the Court noted that the needs in the context of access to adequate housing are diverse.¹⁰³ Such diversity can also be found in the right to food, clothing and other subsistence needs. Article 11 of the CESCR provides the right to adequate standards of living and provides it is imperative to take appropriate measures in order to ensure the satisfaction of these levels. Furthermore,

⁹⁹ Mooney, E. (2005), ‘The Concept of Internal Displacement and The Case for Internally Displaced Persons as a Category of Concern’, *Refugee Survey Quarterly*, Vol.24, Issue 3, p.15.

¹⁰⁰ Principle 3(1) of the Guiding Principles.

¹⁰¹ CESCR (1990), ‘General Comment No. 3: The Nature of States Parties’ Obligations’, E/1991/23, Art. 2 para. 1.

¹⁰² Ibid., para.10.

¹⁰³ Government of the Republic of South Africa and Other v. Grootboom and Others, Case No. CCT 11/00. 2000 (11) BCLR 1169, para 33.

Protocol II¹⁰⁴ contains rules applicable to IDPs in times of non-international armed conflicts. Article 14 of Protocol II prohibits the destruction of objects indispensable to the survival of the civilian population such as food stuffs, live stocks or drinking water, and in times of interstate armed conflict, Article 55 of the Fourth Geneva Convention¹⁰⁵ charges the occupying power with the duty of ensuring the food supplies of the population, which would include IDPs.

As a result of being displaced, IDPs often lose their property and when they attempt to return to their homes there is the possibility that IDPs will find their properties occupied by other people. IHL prohibits any destruction of personal property.¹⁰⁶ Moreover, the Universal Declaration of Human Rights (UDHR) recognises the right to own property¹⁰⁷ and to be protected against arbitrary deprivation of property;¹⁰⁸ however, no comparable right is found either in the International Covenant on Civil and Political Rights (ICCPR) or in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Nevertheless, the right to property is guaranteed under regional human rights conventions. For instance, the Inter-American Commission on Human Rights decided in the Miskito case that compensation should be awarded to returning internally displaced persons for loss of property.¹⁰⁹

Protection from violence such as mass killing or sexual assault is also another specific need of IDPs. In inter-state armed conflicts, the parties to the conflict are obliged to search for the persons who have been reported missing or dead as a consequence of ill-treatment or violence.¹¹⁰ Equivalent guarantees are lacking in the law regulating situations of internal armed conflict but IDPs can invoke all guarantees of human rights like other civilians. In the Mojica case, the Human Rights Committee observed the violation of the right to life

¹⁰⁴ Protocol Additional to the Geneva Conventions, 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609. (Protocol II)

¹⁰⁵ Geneva Convention IV Relative to The Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention).

¹⁰⁶ See Article 53 of Fourth Geneva Convention.

¹⁰⁷ See Article 17(1) of the Universal Declaration of Human Rights (UDHR), UNGA Res. 217 A (III) (1948).

¹⁰⁸ See Article 17(2) of the UDHR.

¹⁰⁹ Report on the situations of human rights of a segment of the Nicaraguan Population of Miskito origin (1983), OEA/Sev.L/V/II.62, Doc. 10

¹¹⁰ Articles 33-34 of Protocol I, Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

recognized in article 6 (1) of the ICCPR in relation to the practice of forced disappearance and stated that the disappearance of Mr. Mojica constituted a violation of right to life.¹¹¹

Moreover, violence against women is relatively high, amongst other issues. Unsatisfactory camp conditions such as the lack of security mechanisms and essential needs exacerbate the vulnerability of women who are subject to sexual assaults. IDPs, particularly women, have frequently been coerced into providing sexual favours in return for essential food, shelter, security¹¹² or other forms of assistance. Such forms of gender-specific violence implicate the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, recognised in Article 12 of ICESCR and Article 25 of UDHR. As the Committee on the Elimination of Discrimination Against Women (CEDAW) states, gender-specific violence impairs or nullifies the right to be free from torture and cruel, inhuman or degrading treatment and punishment.¹¹³ During all armed conflicts, 'adverse distinctions' founded on sex are prohibited.¹¹⁴

The personal liberty of IDPs is often at risk during armed conflicts because IDPs are considered to be part of the political opposition simply because they have run and have left their homes. Article 9 of the UDHR and Article 9(1) of the ICCPR provide the right to be free from arbitrary arrest or detention. However, especially for IDPs, the situation in closed camps is questionable because there are no precedents on this issue that the act of holding someone in a closed camp constitutes detention under these articles. According to Nowak, without a legal basis, IDPs cannot be confined to a closed camp and must be treated in accordance with domestic legislation.¹¹⁵ In IHL there is no special protection for persons whose liberty has been restricted; some of the provisions provide general protection for the treatment of persons in case of detention.¹¹⁶ However, if someone thoroughly looks to these provisions, one can see a gap in the legal protection of IDPs. For instance, the Fourth

¹¹¹ HRC, Views on Communication 449/1991(1994) (Mojica v. Dominican Republic) United Nations document CCPR/C/51/D/449/1991, paras. 5.5 and 6.

¹¹² Cohen, R., & Deng, F. M. (1998). *Masses in flight*, *supra* note 32, p.96.

¹¹³ UN Committee on the Elimination of Discrimination Against Women (CEDAW)(1992). 'CEDAW General Recommendations Nos. 19 and 20', adopted at the Eleventh Session, (contained in Document A/47/38), 1992, A/47/38, para 7(b).

¹¹⁴ In non-international armed conflicts see Protocol II Article 2(1). In interstate armed conflicts see Fourth Geneva Convention Article 27; and Protocol I Article 75(1).

¹¹⁵ Nowak, M. (1993). 'United Nations Covenant on Civil and Political Rights: CCPR Commentary', *Kehl am Rhein by Engel*, pp. 172-173.

¹¹⁶ See Common Article 3 of the Geneva Conventions & Article 5 of Protocol II.

Geneva Convention provides a comprehensive regime for the treatment of internees.¹¹⁷ However, these provisions do not protect against the deprivation of liberty by one's own government. The other gap is for whom these guarantees apply. Persons deprived of their liberty for reasons related to the armed conflict are protected but such frameworks do not cover persons among IDPs who are detained for other reasons.

Internally displaced children also have some special needs. They need to enjoy special protection when they are separated from their parents during displacement and they often are deprived of education. In this regard, the Convention on the Rights of the Children (CRC) is particularly specific. Article 9 of the CRC provides protection from involuntary separation of child from their family, and under Article 8 of the CRC, states have a duty to respect the child's right to maintain family relations. However, some articles of the CRC do not apply to internally displaced children; they deal with refugee children¹¹⁸ or children whose parents reside in different States.¹¹⁹ During times of armed conflict, the legal protection provided for separated families is better than in times of tensions and disturbances.¹²⁰ Article 24 of the Fourth Convention provides for families who are separated by displacement and there are also other provisions relevant to displacement and family displacement.¹²¹ In addition to this need, internally displaced children often lack access to sufficient educational facilities in the area to which they have relocated or their parents may be unable to afford their education expenses. The right to education is provided under Articles 28 and 29 of the CRC, Article 13 of the CESC and Article 4(3)(a) of Protocol II. Human rights and humanitarian law recognize that children have a right to receive at least a basic education even in times of tensions and disturbances or armed conflict. However, displaced children may have specific educational needs and equal opportunity for them needs to be ensured.

When IDPs are displaced from their home, they often lose their personal documentations and lack legal protections. Even though some Articles declare the right to appropriate documentation,¹²² international law does not adequately protect the needs of IDPs for personal documentation. Finally, IDPs are also in need of urgent and regular medical care

¹¹⁷ See Articles 79-135 of the Fourth Geneva Convention.

¹¹⁸ Article 22 of the Convention on the Rights of the Children (Herein after CRC).

¹¹⁹ Article 10 of the CRC.

¹²⁰ Cohen, R., & Deng, F. M. (1998). *Masses in flight*, *supra* note 32, p.111.

¹²¹ See also Article 26 of the Fourth Geneva Convention & Article 74 of Protocol I.

¹²² See Articles 8 and 16 of the CEDAW & Article 4(2) of the ICCPR.

because in camp conditions access to health services is limited and more attention is needed. In addition to how international law addresses their specific needs, how general provisions of national laws, along with other normative instruments specifically intended to protect the rights of IDPs, address their needs is also an important aspect that needs to be considered. It can therefore be argued at this stage that the development of IDP rights can occur at both the international and national level (discussed in Chapters 4 and 5 respectively), even though greater progress can be evident in one particular level when we look at specific IDP rights. Irrespective of such variation, the Guiding Principles comprise the central instrument in this process when it comes to specific IDP rights, as will be discussed in the next section.

2.9. The Content of the Guiding Principles

The discussion so far has demonstrated that despite progress in defining IDPs, substantial gaps remained in what is the rule for devising clear strategies of IDP protection. Principally, responsibility for providing security and well-being to IDPs rests with their own governments, but if government cannot fulfil their obligations, international actors may provide external assistance. However, neither governments nor international organisations and NGOs had developed clear rules towards fulfilling the needs of IDPs. In order to define the rights of IDPs and the responsibilities of governments and the international community towards them, the development of a legal framework for IDPs became one of the main tasks of the UN and the Guiding Principles were drafted. This became the only internationally endorsed instrument that systematically tackles the problems of IDPs. The Guiding Principles are based on IHRL, IHL and refugee law, and fill some existing gaps through the restatement of existing norms. The Guiding Principles identify the various causes of internal displacement and cover all phases of displacement: the pre-displacement phase, the displacement itself, and the return, resettlement and reintegration phase. Although not legally binding like a treaty, the Guiding Principles consolidate the implementation of the relevant existing norms and give international organisations and NGOs an important tool to use in their advocacy work on behalf of IDPs while increasing international awareness.

When we look at the rights and guarantees in the Guiding Principles, they cover a wide range of rights that correspond to the particular needs of IDPs and systematically formulate the specific application of the relevant norms to IDPs. Specifically, the Guiding Principles include rights related to physical security and integrity, the basic necessities of life, civil and political protection needs, and economic, social and cultural protection needs. Thus, the implicit guarantees contained in the existing law are made explicit and applicable to IDPs. The most important function of the Guiding Principles are that they serve 'to fill some of the gaps in legal protection for internally displaced persons...focusing specifically on their particular needs',¹²³ and provide a flexible definition of IDPs in order to cover all IDPs in need of international protection. As Walter Kälin points out, the protection of IDPs must not be limited to securing to survival of them from a rights perspective.¹²⁴ Section I of the Guiding Principles contains general principles and emphasises the right to equality and non-discrimination that is crucial to the protection of IDPs. Any kind of discrimination is prohibited¹²⁵ and it would not therefore be acceptable to help some IDPs of the same ethnic group or political opinion as the government, which is most likely to happen in internal armed conflicts. The section further clarifies the duty bearers and this means it addresses applicability gaps, as national authorities are understood as having the primary duty for providing protection and assistance to IDPs.¹²⁶ This section also provides for the protection of the vulnerable internally displaced women, children and elderly persons¹²⁷ who may require special attention.

Section II contains principles relating to protection from displacement and addresses the issues of the pre-displacement phase. One of the noticeable aspects of Section II is that the right to be protected against being arbitrarily displaced is explicitly identified under Principle 6. The provision fills a large gap in the protection of IDPs because no existing instrument explicitly identifies such a right, while this right is only implicitly mentioned in international law and in provisions relating to the protection from displacement. From this it can be inferred that this right is particularly innovative and could play a major role in reversing

¹²³ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution (1997).1996/52, E/CN.4/1997/43, at para 9.

¹²⁴ Kälin, W. (2005) 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool', *Refugee Survey Quarterly*, Issue 3, p.32.

¹²⁵ See Principle 4 (1) of the Guiding Principles.

¹²⁶ Principle 3(1) of the Guiding Principles.

¹²⁷ Principle 4 (2) of the Guiding Principles.

internal displacement. Furthermore, this section provides a list of when displacement is not permissible¹²⁸ and also provides guarantees that need to be met in situations when displacement occurs.¹²⁹

Section III relating to protection during displacement sets forth a wide range of civil, political, economic, social and cultural rights.¹³⁰ IDPs enjoy these rights in order to achieve the fulfilment of their specific needs in cases where normative gaps exist in the protection of IDPs. The section sets a minimum core obligation for the treatment of IDPs and all the rights and guarantees mentioned in this section are interrelated. For instance, the right addressing subsistence needs and the right addressing physical safety cannot be separated, and respect for one right may be essential to achieving another, as all categories of rights reinforce each other. Among all these rights, it is noteworthy to mention the ‘right to seek safety in another part of the country or abroad and to be protected against forcible return to situations of danger’. As Phuong points out, the right to return is not explicitly mentioned in any international treaty but one can articulate this right in international law. Compared with the right to return, it can be argued that the right not to return has a stronger legal basis.¹³¹ The 1951 Refugee Convention explicitly states the prohibition of refoulement, which provides the protection of refugees where he/she would be at risk of persecution.¹³² It can be noted that ‘whereas refugees have a right not to return their country of origin under certain circumstances, it is not entirely clear that internally displaced persons have a similar right.’¹³³ For this reason, Principle 15 of the Guiding Principles provides this right to IDPs. It is acknowledged that ‘this is a novel principle with no direct antecedent in existing instruments’.¹³⁴ Unlike the provisions of the 1951 Convention, Principle 15 of the Guiding Principles also specifically underscores the right of IDPs to seek asylum in other countries. In

¹²⁸ Principle 6 (2) of the Guiding Principles.

¹²⁹ Principles 7- 9 of the Guiding Principles.

¹³⁰ The Principles provide that IDPs have the right to life, dignity, and access to food, water, shelter, clothing, medical services and sanitation essential to their survival. IDPs should be protected against human rights abuse, including direct assault, sexual violence, attacks on their camps and settlements, being arbitrarily detained or held hostage in camps, or being forcibly returned to or resettled to places where their life, safety, liberty and/or health would be at risk. For further content see Principles 10-23 of the Guiding Principles.

¹³¹ Phoung, C. (2005). ‘Forcible Displacement in Peace Agreements’, *International Council on Human Rights Policy Review Meeting*, Belfast. pp.1-3.

¹³² See article 33(1) of the 1951 Refugee Convention.

¹³³ Phoung, C. (2005) ‘Forcible Displacement in Peace Agreements’, *supra* note 131, pp.3-4.

¹³⁴ Kälén, W. (2008), ‘Guiding Principles on Internal Displacement: Annotations’, 2nd ed., Studies in Transnational Legal Policy 38, *American Society of International Laws and Brookings Institution*, (Annotations), p.69.

addition, the section provides protection of IDPs' properties from arbitrary and illegal appropriation,¹³⁵ and clarifies the implementation of civil and political rights.

Section IV of the Guiding Principles reflects the effort to establish a balance between state sovereignty and humanitarian imperatives. The fundamental concepts of sovereignty and non-intervention comprise major challenges for the protection of IDPs. The principle of sovereignty is embodied in the UN Charter under Article 2(1) that is based on 'equality of all its Members.' The principle of sovereignty can be considered as the State's ability to exercise its powers without being held accountable to an outside authority. The principle of non-intervention is also stated in the UN Charter under Article 2(7).¹³⁶ According to the principles of sovereignty and non-intervention, a state has a complete control over its internal affairs and external interference in the domestic affairs may constitute a violation of these provisions of the UN Charter. The concept of IDPs falls within the domestic jurisdiction and sovereignty competence of the state concerned. A state may claim that the plight of IDPs is an internal matter and no other state has the right to protect or assist these people who are within the boundaries of that particular state. Basically, as stated in the Guiding Principles, the primary responsibility for the displaced rests with their own government.¹³⁷ However, in the case of a government being unable or unwilling to protect these people or deliberately refusing international assistance, it is expected from the international community to get involved in such a situation. In this regard, Section IV first affirms the primary duty of states to protect and assist IDPs, and then supports the view that a state's treatment of IDPs is no longer solely a domestic matter when that state fails to provide protection and assistance. Francis Deng, former Special Representative of IDPs, accordingly identified the notion of 'sovereignty as responsibility' and stated in his report that 'if a Government is incapable of providing protection and assistance then the international community should act, either on the invitation of the host country or with international consensus, to fill the vacuum.'¹³⁸ Sovereignty as responsibility prescribes a broad package of measures, including 'not only responsibility to react to protect populations

¹³⁵ Principle 21 of the Guiding Principles.

¹³⁶ Furthermore, Article 3 of Protocol II of the Geneva Conventions specifically prohibits intervention in the internal affairs of its member states

¹³⁷ Principles 3 and 25 of the Guiding Principles.

¹³⁸ Commission on Human Rights (1993), 'Comprehensive study of the Representative of the Secretary-General on the human rights issues related to internally displaced persons', E/CN.4/1993/35, para.151. available at: <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G93/105/95/PDF/G9310595.pdf?OpenElement>

from grievous harm but also the responsibility to prevent such situations and to rebuild in their aftermath.¹³⁹ In this respect, Section IV acknowledges the right of international actors to offer assistance and the duty of states to accept such offer.

Furthermore, Section V relating to return, resettlement and reintegration sets forth the right of IDPs to return voluntarily and in safety to their homes or to resettle to another part of the country. It can be said that this section provides long-term and permanent solutions to the plight of IDPs because it further provides for the recovery of property and for compensation or reparation if recovery is not possible.¹⁴⁰ One of the important aspects of Section V is to articulate the full participation of IDPs in the planning and management of their return or resettlement and reintegration.¹⁴¹ As Bell points out, local integration in the host country is one of the key durable solutions where forcible displacement exists.¹⁴²

Knowing when internal displacement ends is important to determining whether national as well as international responsibility, attention and resources have to be provided in response to the objective realities on the ground. However, there is no systematic approach to the issue of when internal displacement ends. The methodologies used and the conclusions reached differ among humanitarian organisations. For example, in Rwanda, serious differences of opinion arose among various UN agencies and offices, all using different criteria, on the issue of whether the hundreds of thousands of IDPs who resettled as part of the 'villagisation' programme in the late 1990s should still be considered as IDPs.¹⁴³ The Guiding Principles, which spell out the rights and guarantees pertaining to IDPs in all phases of displacement, stipulate that 'displacement shall last no longer than required by the circumstances'.¹⁴⁴ Yet, the Principles do not contain a cessation clause as to their application. Kälin argued that this is not a gap in the Guiding Principles because there are different areas of international law (human rights law, humanitarian law) addressing the

¹³⁹ Mooney, E. (2008). 'The Guiding Principles and the Responsibility to Protect', *Forced Migration Review-GP10*, p.12.

¹⁴⁰ Principle 29 (2) of the Guiding Principles.

¹⁴¹ Principle 28 (2) of the Guiding Principles.

¹⁴² Bell, C. (2006). 'Negotiating justice. Human rights and peace agreements'. *International Council on Human Rights Policy*, p.55.

¹⁴³ Mooney, E. (2003), 'Bringing the end into sight for internally displaced persons' *The Brookings-SAIS Project on Internal Displacement*, FMR 17, p.4.

¹⁴⁴ Principle 6 (3) of the Guiding Principles.

issue of cessation.¹⁴⁵ Nonetheless, it still seems to be unclear how to invoke the guarantees provided in international law and make them particularly relevant to IDPs without any concrete assessment criteria on when to stop counting someone as internally displaced. For instance, if we look at how the Refugee Convention deals with the cessation of refugee status, it would help to solve the problem discussed here in but only in a limited way. The limited relevance of the refugee Convention for IDPs can be clearly seen when the cessation clause refers to the cessation of a legal status.¹⁴⁶ Cessation of legal status is not the case for IDPs, as they do not constitute a distinct legal category. Moreover, in the case of refugees, the UNHCR has guidelines in determining when a particular group no longer needs protection as refugees. The UNHCR can apply the Refugee Convention's 'cessation clause'¹⁴⁷ and end the group's status as refugees.¹⁴⁸ However, no organisation has a mandate to make such a determination for IDPs and facilitate their return. It needs to be considered that cessation of IDP status based on their return to areas of origin is not the only way to end IDP status. IDPs may integrate in the local area of destination and/or resettle in third places with their consent. If their needs caused by displacement cease to exist and if they regain benefits that they enjoy previously, internal resettlement without returning to their areas of origin can end IDP status.

The factual situation of displacement in most cases changes and ends gradually. The status of IDPs needs to be determined on a case-by-case basis. In the absence of clear guidelines on when displacement ends, this would appear the most efficient and realistic approach. Another possible approach would be to assess when the needs and vulnerabilities specific to IDPs no longer exist. The Guiding Principles point to needs that would be relevant in this regard; for instance, in the areas of protection, lack of shelter and other deprivations resulting from displacement, documentation, and recovery of or compensation for property lost as a result of displacement. If IDPs are able to access the protection and assistance of

¹⁴⁵ Kālin, W. (2003), 'The legal dimension', *The Brookings-SAIS Project on Internal Displacement*, FMR 17, p.15.

¹⁴⁶ Article 1(C)(5) of the 1951 Refugee Convention: 'He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality'.

¹⁴⁷ For instance, the existence of 'changed circumstances' from those that had compelled flight in the first place, such as the end of a conflict or a change in government such that there is no longer a well-founded fear of persecution. For further info see Guidelines on International Protection: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), HCR/GIP/03/03.

¹⁴⁸ Ibid.

their national governments, and no longer have unmet needs on the basis of being displaced, then this would constitute the main criterion for determining whether to end IDP status. However, even in this needs-based approach, there are some problems with regards deciding whether all needs have been met in situations of prolonged displacement. In some cases, many families have been displaced from their property for many years and those who consider themselves displaced are unlikely to reclaim land that their ancestors once farmed.¹⁴⁹

The main reason related to the uncertainty of deciding when to end displacement is the lack of information and analysis on what happens to people once they return or resettle, or when they reach IDP camps. If governments actively prevent observers and humanitarian aid workers from entering zones of displacement, it will be impossible to find durable solutions to the plight of IDPs. For this reason, national authorities' collaboration and cooperation with humanitarian organisations is necessary.

Finally, it is noteworthy to mention that throughout the Guiding Principles extensive emphasis is given on the needs and rights of women and children, which includes free and compulsory education for IDP children, the prohibition of forced recruitment of children into armed forces, and full participation of women in the distribution of food. The Principles thus offer more protection to vulnerable groups among IDPs. Overall, the Guiding Principles reflect already existing international law rules, and this is evident in almost each principle; therefore, the Guiding Principles also reflect, to some extent, the legal ground of how IDPs can be protected. The hard and soft law dimensions of such legal grounds demand further analysis, which will now be the focus.

2.10. The Legal Nature of the Guiding Principles

Analysis of the legal dimension of IDP protection usually takes the Guiding Principles as its point of departure. The Guiding Principles, as elaborated in the instrument itself, are not a legally binding document, and therefore they have a soft law character. However, one can

¹⁴⁹ This is case for internally displaced South Africans. Under apartheid statutes an estimated 3.5 million people were displaced between 1960 and 1980. For further info see South African Department of Land Affairs (1996), February, Green Paper on Land Appear Policy in South Africa.

argue that they do not even constitute typical soft law as they were prepared, reviewed and finalized by experts outside the traditional intergovernmental process i.e., they do not belong to those recommendations that rest on the consensus of states. As the former Representative of the Secretary-General on the Human Rights of IDPs has pointed out, unlike treaties, declarations, resolutions or recommendations, 'they have not been negotiated by States but prepared by a team of experts in close consultation with the concerned agencies and organizations and then submitted to the Human Rights Commission'.¹⁵⁰ Therefore, their soft law character stems not from the process of elaboration but from their content which is solidly grounded in existing international law.¹⁵¹ As stated in paragraph 3 of the Introduction, that 'these principles reflect and are consistent with international human rights law and international humanitarian law'¹⁵². Indeed, the Guiding Principles did not create new legal norms but purported merely to infer how existing rules of IHL and IHRL would apply to contexts of internal displacement. Although not legally binding, it is possible to discern a range of legal developments in relation to IDP protection that result from the proactive promotion of the Guiding Principles in the 22 years since they were presented to states in 1998. These patterns of legal developments have been identified and documented by scholars in two main areas, namely: (a) in the national law of a range of countries across the world; and (b) in the international law developed by UNSC, UNGA and regional bodies in Europe, Africa and America.

At the international level, the legal developments can be identified in the following examples. In 2003, the UN Commission on Human Rights expressed 'appreciation' for the principles, called them a 'standard', welcomed their 'dissemination, promotion and application' worldwide, and welcomed the fact that 'an increasing number of states, UN agencies and regional and non-governmental organizations were applying them'.¹⁵³ In 2005, 193 heads of state at the World Summit had unanimously recognized the Guiding Principles recognized the Principles in their Outcome document as an 'important international

¹⁵⁰ Kalin, W. (2005), 'The Guiding Principles', *supra* note 124, p.24.

¹⁵¹ *Ibid.*

¹⁵² The Guiding Principles, Introduction, para.3.

¹⁵³ UN Commission on Human Rights (2003), Res. 2003/51.

framework for the protection of IDPs'.¹⁵⁴ Furthermore, the UNSC has begun citing the Guiding Principles in its resolutions and presidential statements.

Comparable support for the Guiding Principles is found at the regional level. For example, the Parliamentary Assembly of the Council of Europe has urged member states to incorporate the Guiding Principles into their domestic law, and the Organization for Cooperation and Security in Europe has recognized the Principles as a 'useful tool' in fashioning national policies on internal displacement.¹⁵⁵ Even though such steps at the regional and international levels were promising in the 2000s, they did not clarify whether the Guiding Principles constituted a legal, moral, or just a political framework. The concrete evidence of the legal nature of the Guiding Principles has been observed in 2009 with their incorporation into hard law with the adoption of the Kampala Convention making them hard law in Africa and reinforcing their status worldwide. The Kampala Convention is a landmark step in recognition of states to be legally bound by a regional convention and it provides further evidence of the impact and influence of the Guiding Principles.

Despite the fact that the Guiding Principles were not drafted or formally approved by an intergovernmental process, UN agencies, regional organizations, NGOs, and a growing number of governments have begun to cite them and to use them as the basis for policies, laws, and programs for IDPs.¹⁵⁶ This clearly reflects one of the purposes of the Guiding Principles as stated in the paragraph 3 of the Introduction as to provide guidance to a range of actors, not just states and rebel groups but also international organisations, inter-governmental organisations and NGOs.¹⁵⁷

At national level, IDP protection standards are gradually 'hardening' into law, particularly in countries affected by armed conflict or widespread violence. Over the 22 years following the promulgation of the Guiding Principles, new forms of 'hard' IDP law at the national level have emerged.¹⁵⁸ Naturally, the scope, content, and legal character of these national frameworks on IDPs are quite variable, a fact that reflects differences in the legal systems, internal politics, and perceived displacement challenges of each country. Even so, many of

¹⁵⁴ UNGA A/RES/60/1, 2005, para. 132.

¹⁵⁵ Cohen, R. (2004) 'An Innovation in International Standard Setting', *supra* note 12, pp.469-470.

¹⁵⁶ For instance, ICRC, UNCHR, World Food Programme, OCHA and IASC. see Cohen, R. (2004) 'An Innovation in International Standard Setting', *supra* note 12, pp.468-470.

¹⁵⁷ GPID, Intro. Para 3(d).

¹⁵⁸ A detailed analysis of national IDP instruments is provided in Chapter 4.

these national IDP protection frameworks are based, in full or in part, on the global standards set out in the Guiding Principles. At the national level, these developments give impetus to IDP protection as a distinct legal field.

As the Guiding Principles are more widely disseminated and accepted, some commentators have suggested that they may, in fact, become customary international law.¹⁵⁹ To understand customary nature of IDP norms two constitutive elements of international customary law, as the International Court of Justice stated, needs to be investigated: 1) the general practice of states, and (2) opinion juris¹⁶⁰ i.e., elements of law that states engage in a practice out of a sense of legal obligation. When we look at state practice, it becomes obvious that some states have accepted the 'authoritative character' of the Guiding Principles in their national IDP frameworks, some of these frameworks even become IDP law and directly reference and incorporate the Guiding Principles.¹⁶¹ In this regard, domestic laws, court decisions may gain greater potency as evidence of custom to the extent they establish specific powers that are exercised fully in practice.¹⁶² For instance, the Constitutional Court of Colombia reaffirmed and justified the authoritative character of the Guiding Principles in two ways: (i) Constitutional Court clarified the Guiding Principles legal standing, it has even come to consider that some of the provisions contained in the principles form part of the constitutionality block, clarifying that they compile the international obligations of the Colombian State by virtue of different treaties in the fields of IHL and IHRL, but it has also been explicit in considering them as parameters for normative creation and interpretation in the field of regulation of forced displacement and assistance of IDPs by the state¹⁶³ (ii) When determining the constitutional rights, the Court made

¹⁵⁹ Simons M. (2002), 'The Emergence of a Norm Against Arbitrary Forced Relocation, 34 COLUM. HUM. RTS. L. REV. 95, 128("The Guiding Principles on Internal Displacement, although not yet customary international law, may soon reach that status.")

¹⁶⁰ See International Court of Justice Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27); also see International Court of Justice, Continental Shelf case (Libyan Arab Jamahiriya v. Malta), Judgment, 3 June 1985, ICJ Reports 1985, pp. 29–30 : "...the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States".

¹⁶¹ A detailed analysis of national IDP instruments is provided in Chapter 4.

¹⁶² Kälin, W (2001), 'How hard is soft law?', *supra* note 10, p.9.

¹⁶³ Sentencia T-468/06 Registro Nacional de Poblacion Desplazada-Requisitos, Section II, para. 8. English version is available in the official website of the Colombian Constitutional Court at: <https://www.corteconstitucional.gov.co/relatoria/2006/T-468-06.htm>

specific reference to different Principles that are threatened or violated during forced internal displacement.¹⁶⁴

However, it should be born in mind that state practice has not been wholly favourable regarding the Guiding Principles and their acceptance as international law. During the attempts to reach consensus on the 1998 resolution approving the Guiding Principles, Egypt, Sudan, India and Mexico expressed concern regarding the way the Guiding Principles were being developed, most notably that they were never formally negotiated or adopted by an intergovernmental forum.¹⁶⁵ For this reason, general practice of states may not always give the answer of the customary nature of the Guiding Principles. In this respect, another key factor to consider in development of the Guiding Principles as customary international law will be whether states, especially affected states, make specific objections to the Principles as constituting customary international law. In other words, have affected states act out of a sense of legal obligation rather than tradition or courtesy.¹⁶⁶ The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. 'The frequency, or even habitual character of the acts, is not in itself enough'.¹⁶⁷ As of 2021, there are in total 26 IDP Laws are adopted¹⁶⁸ and all of these states that have adopted IDP law are affected states by internal displacement. It is not clear that there is enough evidence to conclude that the Guiding Principles as a whole have become customary international law, although there are indications of progress towards that end. Thus, as each Principle have emerged from different provisions of IHL and IHRL, it is important to consider each Principle's legal development in relation to IDP protection on a case by case basis i.e. some Principles may be grounded in more established international law rules than others, or some Principles may be implemented in a more effective way that might create emerging field of IDP law. However, this lack of clarity on their legal status should not diminish that they unquestionably represent a powerful tool in regulating international conduct through their influence as soft law.

¹⁶⁴ Corte Constitucional de Colombia (CC), Sentencia T-025/2004, English version Colombian Constitutional Court's decision regarding displaced populations (decision T-025 of 2004)

¹⁶⁵ Cohen, R. (2004) 'An Innovation in International Standard Setting', *supra* note 12, p.460.

¹⁶⁶ Schmidt, P. L. (2004). The process and prospects for the u.n. guiding principles on internal displacement to become customary international law: preliminary assessment. *Georgetown Journal of International Law*, 35(3), p.512.

¹⁶⁷ North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

¹⁶⁸ See <https://www.globalprotectioncluster.org/laws/>

The legal importance of the Guiding Principles in IDP protection is evident by, first, the increasing number of IDP laws that are adopted by the affected states that recognise the Guiding Principles as an authoritative instrument in IDP protection, and, second, by the increasing number of international and national court decisions that clarify the Guiding Principle's legal standing and their effective implementation. The Guiding Principles are therefore critical for the protection of IDP rights at both the international and the national level, and Chapters 4 and 5 will demonstrate how such development has taken place.

2.11. Prevention is Better Than Cure

Following the more general background provided above on the legal significance of the Guiding Principles, the discussion now focuses on the main subject of the thesis, which is the importance of Principle 6 in the area of prevention of internal displacement. As explained in detail in the previous section, the Guiding Principles cover three main pillars: prevention, humanitarian assistance and durable solutions. However, the prevention aspect is largely neglected so far. When the concept of 'prevention of forced displacement' surfaced with the refugee flows in the 1980s, the perceived threat posed by these flows to national, regional and international security was mainly intended to be addressed from a refugee protection perspective rather than addressing the needs of displaced people before becoming refugees. Therefore, the prevention of displacement was perceived as the prevention of refugee flows rather than preventing the root causes of displacement from appearing.¹⁶⁹ Even though a clear link between violations of human rights and the flight of displaced people was made,¹⁷⁰ the human rights approach to the prevention of forced displacement has gained its influence in the 1990s. Indeed, the increased attention to IDP's protection in the late 1990s has contributed to the need to deal with the issues of prevention of displacement from a human-rights perspective rather than a politically-driven decision by states.¹⁷¹ In this respect, the adoption of the Guiding Principles is a good

¹⁶⁹See United Nations, Economic and Social Council, Study on Human Rights and Massive Exoduses, E/CN.4/1503, 31 December 1981; UN General Assembly, International Co-operation to Avert New Flows of Refugees : Note by the Secretary-General, 13 May 1986, A/41/324

¹⁷⁰Report of the Secretary-General, United Nations, General Assembly, A/36/582, 23 October 1981.

¹⁷¹Senior Protection Officer of UNHCR states that "The 90s were to witness a dramatic change in the way international relations affected humanitarian policies, of which the expansion of the concept of prevention

example of this human rights approach since these are based on the human rights of displaced people and the inclusion of a right that deals with the prevention of displacement, the right to be protected against forced displacement.

In the context of IDP protection, the concept of ‘prevention of internal displacement’ refers to two fundamental steps that states can take to exercise their responsibility with regard to internal displacement. The first step is the prevention of the root causes of forced internal displacement or the prevention of people from getting exposed to situations that can be considered as causing a risk of displacement and where some kind of violations of rights or harm to civilians is not already happening. The second step is about when displacement is unavoidable, and that is aiming at taking steps in advance to mitigate its harmful effects. Thus, the prevention of acts that lead to displacement is not only focused on measures to distil what must be done before displacement occurs but also minimise forced displacement and mitigate its adverse effects when displacement becomes the only option. These efforts should not be perceived as the restriction of freedom of movement, impeding people’s ability to move, or influencing their decision to do so.¹⁷² Otherwise, strictly limiting the content of prevention of internal displacement merely to the foreseeable displacement before this displacement happens would not be feasible or practical. The prevention of displacement should be covering the prohibition of forced displacement as well as what may be the exceptions to this prohibition, including the conditions under which legal displacement can be carried out to promote respect for the right not to be arbitrarily displaced. Therefore, Section II of the Guiding Principles, comprising Principles 5 through 9, reflects how the prevention of internal displacement should be understood within the context of IDP’s right to be protected from arbitrary displacement. These principles relating to protection from displacement contain a range of state obligations on the prevention of internal displacement such as full respect for international law, and in particular human rights and humanitarian law (Principle 5), taking positive steps to mitigate particular population’s (children, women or elderly), existing vulnerability to displacement (Principle 7) and protection of fundamental human rights (right to life, dignity, liberty and security) of

was one of its main manifestations”, Zapater, J. (2010), ‘Prevention of forced displacement: the inconsistencies of a concept’, p.5, available at: <https://www.unhcr.org/4bbb2a199.pdf>

¹⁷² Handbook for the Protection of Internally Displaced Persons, Global Protection Cluster Working Group, (2007), December, p.164, available at <http://www.unhcr.org/refworld/pdfid/4790cbc02.pdf>

those displaced in situations where displacement is absolutely necessary (Principle 8). These principles cover the substantive guarantees to ensure respect for any human right. In other words, respect for the right to life, dignity or to protect women and children, or respect for IHRL and IHL, are the most fundamental prerequisites to the enjoyment of human rights or to the protection of civilians.¹⁷³ If these substantive guarantees are not violated, it is then possible to attain a higher level of reinforcement of protection from internal displacement. In this sense, Principles 5,7 and 8 underlie the interdependency of human rights and clearly demonstrate that the right not to be arbitrarily displaced cannot be adequately protected if the substantive rights are not guaranteed. Therefore, it is not surprising to see these substantive guarantees within the principles relating to protection from displacement in order to strengthen the protection of the right not to be arbitrarily displaced. The legal foundation of these principles is well established and the rights they include are explicitly recognised under IHRL. When we look at Principle 9, it provides the right of indigenous people to protection from displacement and therefore highlights the state obligation to protect against the displacement of indigenous people. This right can also be explicitly found in instruments on the rights of indigenous peoples.¹⁷⁴ However, compared with the other principles regarding the protection from displacement, Principle 6 contains an innovative right called ‘the right to be protected against being arbitrarily displaced from his or her home or place of habitual resident’. The reasons for this right being an innovative right can be explained as follows.

The Guiding Principles describe in detail the guarantees available to IDPs that must be provided both in order to prevent arbitrary displacement and to mitigate its adverse effects. The Guiding Principles are grounded in existing human rights and humanitarian law standards. Thus, they reflect existing rules and clarify how they apply to internal displacement settings instead of creating new obligations. In order to clarify the content and the applicability of each Principle to situations of internal displacement, it is possible to cite a multitude of existing legal provisions for almost every principle. For instance, the legal basis for Principle 1, which deals with IDPs’ protection from discrimination, can be explicitly

¹⁷³ Kälin W& Künzli J (2010), ‘The Law of International Human Rights Protection’, *Oxford University Press*, Part III (Substantive Guarantees).

¹⁷⁴ Article 16 of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

found in many existing human rights and humanitarian law provisions.¹⁷⁵ Guarantees regarding the principle of non-discrimination are clear and as a civilian, an IDP's right to be protected against discrimination is very well grounded in international law. Therefore, in IDP cases where the principle of non-discrimination is concerned, it is not questioned whether this principle exists, but how it can be better provided to those in need. However, some rights included in the Guiding Principles do not reflect this clear explicit legal basis. In other words, the language was used in a more general sense in the existing treaty law when we consider the content of some Principles. In this respect, Principle 6 on 'the right not to be arbitrarily displaced' is a good example of this condition. No existing instrument mentions such a right explicitly. However, IHL prohibits displacement in some specific and limited situations and IHRL, in a more general sense, guarantees not only freedom of movement but also the right to choose one's own residence. Therefore, protection against arbitrary acts of displacement can only be deduced from the relevant provisions of international law. The contribution made by Principle 6 of the Guiding Principles is to first explicitly mention this right and "the purpose of expressly stating a right not to be arbitrarily displaced was to defin[e] explicitly what is now only implicit in international law".¹⁷⁶ Furthermore, Principle 6 also contributes to adequate and comprehensive coverage of all instances of arbitrary displacement since other movement-related rights do not spell out all the circumstances under which displacement is permissible. In the light of this information, Principle 6 states that:

"1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.

2. The prohibition of arbitrary displacement includes displacement:

(a) When it is based on policies of apartheid, ethnic cleansing or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;

(b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;

¹⁷⁵ Kälin, W (2008), 'Guiding Principles on Internal Displacement: Annotations', *supra* note 134, pp. 11-15.

¹⁷⁶ Kälin, W (2008), 'Guiding Principles on Internal Displacement: Annotations', *supra* note 134, pp. 26-27.

- (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
- (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
- (e) When it is used as a collective punishment.

3. Displacement shall last no longer than required by the circumstances.”¹⁷⁷

The first paragraph clearly reflects the IHRL perspective and the second paragraph reflects IHRL and IHL provisions, depending on what kind of cases lead to displacement of people. The explicit recognition of the right not to be arbitrarily displaced is a positive step for states, especially for the countries with a high number of IDPs, as it ensures that individuals and groups are not subjected to involuntary displacement except when absolutely necessary, and that in such cases, displacement is not carried out in an arbitrary manner, in violation of international law. Promoting the explicit recognition of this right in the Guiding Principles is an essential element to raising awareness of the need for IDPs protection from arbitrary displacement and therefore, their specific protection needs.

However, the legal foundations of this right under IHL and IHRL, and the question as to what extent this right fills the gaps in those regimes in order to make them more responsive and specific to the pre-displacement phase, needs to be clarified. Chapter 3 will focus on such clarification. This examination would then help towards the clarification of the content of the right not to be arbitrarily displaced and its development as a human right, as well as the review of relevant national laws and policies to ensure that they incorporate basic international law protections. These aspects will be examined in detail in Chapters 4 and 5.

2.12. Conclusion

An increasing number of persons in many corners of the world has been forced to leave their homes as a result of armed conflicts, systematic violations of human rights, natural disasters and development projects such as dam projects. The international response to

¹⁷⁷ Principle 6 of the Guiding Principles.

these circumstances is not only driven by human rights concerns but also because of collective interest in regional stability. Internal displacement poses a challenge to states, international organisations and non-state organisations to develop institutions and operational strategies for preventing and addressing such challenge. The Special Representative on IDPs is the only position to focus exclusively on the problem of internal displacement and with the aim of addressing both protection and assistance. The main contribution of this position has been to create an environment that facilitated the drafting of the Guiding Principles. As can be seen from the above discussion, the definition of IDPs in the Guiding Principles is now widely recognised and has contributed to raising awareness of the plight of IDPs. Such increasing awareness on the plights of IDPs can be reflected in the response of humanitarian organisations to the protection and assistance needs of IDPs, and in the increasing focus on IDP issues in the agenda of these organisations. The chapter showed how the IDP definition provided by the Guiding Principles is more of a descriptive rather than a legal one in order to clearly signal IDPs' vulnerabilities and needs. Nevertheless, the definition made it easier to decide who should be considered under this category and in this way, to address their rights and needs with the relevant legal norms of international human rights and humanitarian law. It has also contributed to changing the attitudes of some international organisations towards IDPs, which previously had some concerns to label IDPs as a special category of people.

However, there is no leading organisation that has developed the principal authority in regulating and monitoring issues regarding IDPs, but rather the existing distribution of tasks shows a fragmented form of governance where overlapping of functions is evident. These problems led the UN to devise more effective ways to respond to IDP situations, and develop two systems, the cluster approach and a more concrete approach that includes the UNSC and its peacekeeping operations. Bearing in mind the primary responsibility of national authorities to provide protection and assistance to IDPs, the responsibilities of governments and international actors in providing protection and assistance to IDPs need to be complementary to each other. In this respect, the plights of IDPs need to be addressed at both in national and international level, as will be shown in the following chapters.

Despite the fragmented domain when it comes to the protection of IDPs, the chapter showed that the Guiding Principles were an important milestone in advancing IDP rights,

and in particular, the establishment of the right not to be arbitrarily displaced formed a turning point as this right emerged as a critical and innovative right. This right must be understood against the background of the multiple developments that occurred with regards to the protection of IDPs. Since we have seen in this chapter how both the definitions and the actual types of protection of IDPs, as well as the institutional response to their plights, can vary, despite the recognition of the problem of internal displacement itself, the emergence of the right not to be arbitrarily displaced can be seen as a promising development that could help overcome some of the barriers to more effective IDP protection identified in this chapter. The main finding of this chapter is that the Guiding Principles and Principle 6 in particular, represented a defining moment in the recognition of IDP rights and their protection, and generated an important potential in terms of filling gaps in international law but also potentially allowing states to take more effective steps. Principle 6 represent the starting point of the development of the right not to be arbitrarily displaced at both the international and national level, and as the remaining chapters will show, international law and national legal frameworks both allow for further reinforcing and advancing this right. The following chapter examine exactly these developments, focusing on an analysis of the development of the right not to be arbitrarily displaced in international law and on the potential of this right to re-invoke existing articles in IHL, IHRL and ICL, while also filling gaps in key areas of these fundamental regimes of international law.

CHAPTER 3: PROHIBITION OF FORCED DISPLACEMENT: ITS SCOPE OF APPLICATION IN THE IDP CONCEPT AND THE APPLICABLE LAW

3.1. Introduction

The discussion in the previous chapter demonstrated how the definition of IDPs has evolved and how the Guiding Principles created a fundamental international instrument re-defining IDP rights. Within these rights, the right not to be arbitrarily displaced, as encompassed in Principle 6, is especially important as it covers a new area of internal displacement that is focused on the prevention aspect. The main finding of the previous chapter was that the Guiding Principles initiated the development of the right not to be arbitrarily displaced at both the international and national level. The following chapters will examine how exactly such development has occurred internationally and nationally, beginning with this chapter that looks at the development of the right not to be arbitrarily displaced in the context of international law. Specifically, the discussion will focus on the legal grounds of the right in three key regimes of international law. This chapter will analyse the application of IHL and IHRL rules to IDPs in the context of the prohibition of forced displacement. International Criminal Law (ICL) will also be examined for a better understanding of the subject concerning the criminal responsibility for the acts of forced displacement. Therefore, this chapter aims to shed light on the legal foundations of the right not to be arbitrarily displaced under the existing international law and identify potential areas that this right can contribute to. Two clarifications need to be provided upfront. First, the extent to which the chapter will discuss concepts from IHL, IHRL and ICL will be determined by the extent to which these three areas of international law deal with forced displacement, especially within border. Second, the argument that the right not to be arbitrarily displaced has legal grounds on these three areas of international law, does not mean that these legal grounds operate in the same way. The argument is instead about the importance of identifying the links of the right with these three areas, recognising that IHL, IHRL and ICL will each provide their distinct contributions to how the right develops at the international level.

The discussion in this chapter will first analyse the interaction between IHL, IHRL and ICL, and will then focus on the forced displacement of IDPs. The chapter will then analyse the prohibition of forced displacement under IHL, focusing on forced displacement under

international armed conflict and under non-international armed conflict. The chapter will then discuss the prohibition of forced displacement under ICL, covering how forced displacement is linked to war crimes, crimes against humanity, ethnic cleansing, and inhumane acts. Finally, the chapter will examine the prohibition of forced displacement under IHRL. By examining all three areas of international law, the chapter will identify the legal grounds that shape the development of the right not to be arbitrarily displaced at the international level, and such analysis will then lead us to examining the legal status of the right as a free-standing human right, which will be discussed in Chapter 4. At this point, the analysis of the development of the right at the international level will be completed, and the rest of the thesis will shift focus at the national level through a detailed comparative analysis of national frameworks (Chapter 5).

3.2. Interaction between IHL, IHRL and ICL

The discussion of this chapter in identifying the legal grounds of the right not to be arbitrarily displaced will show that such grounds are interconnected because of the broader interactions between IHL, IHRL and ICL. It is therefore first important to provide some context of these broader interactions between these three major areas of international law. IHL is the branch of customary and treaty-based international positive law whose purposes are to limit the methods and means of warfare and to protect the victims of armed conflicts. In this sense IHL covers the so-called ‘law of The Hague’ as well as the so-called ‘law of Geneva’. The former relates to the rules that deal with restrictions and prohibitions on the means and methods of warfare;¹⁷⁸ the latter contains provisions regarding the protection of victims of armed conflict and those who no longer take part in the hostilities.¹⁷⁹ IHRL consists of a set of international rules, on the basis of which individuals and groups can expect and claim certain behaviour or benefits from governments.¹⁸⁰ In this sense, the human rights system directly addresses the responsibility of governments vis-à-vis

¹⁷⁸ Pictet, J.S. (1988) ‘International Humanitarian Law: Definition,’ in *International Dimensions of Humanitarian Law*, ed. Henry-Dunant Institute UNESCO, xx.

¹⁷⁹ *Ibid.*, xix.

¹⁸⁰ International Committee of the Red Cross (2005) ‘What is the difference between humanitarian law and human rights law?’, available at: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0703.pdf

populations over which they exercise power, authority, or jurisdiction, largely regardless of nationality.¹⁸¹ Also the internationalisation of human rights law does not alter this situation.

The common background is that while humanitarian law applies only to armed conflicts, as stipulated, for instance, in Common Article 2 of the 1949 Geneva Conventions, human rights law applies in both peace and war. According to the European Union Guidelines on promoting compliance with IHL, 'IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation.'¹⁸²

Most IDPs are found in situations of armed conflict, hence the importance of international humanitarian law which regulates the conduct of hostilities is apparent. Internal displacement also occurs in times of peace (e.g. natural disasters) or internal strife during which humanitarian law is not applicable, whereas human rights norms remain applicable in almost all situations.

The interdependence between these two fields is confirmed in the jurisprudence of the International Court of Justice (ICJ). As the ICJ emphasized in the case of the DRC v. Uganda, human rights treaties continue to apply in wartime. They apply together with humanitarian law.¹⁸³ In this case, the Congo claimed that serious and widespread human rights and humanitarian law violations were committed by the Ugandan forces in the occupied parts of the Congo, against the lives and property of the Congolese population.¹⁸⁴ The Court observed that Uganda was responsible for violations of human rights law and humanitarian law.¹⁸⁵ As clearly stated by one commentator 'the Court did not consider the two sets of rules of IHL and HRL in separate way, but identified the rules applicable in the occupied

¹⁸¹ Meron, T. (2000) 'The Humanization of Humanitarian Law', *The American Journal of International Law*, Vol. 94, No. 2, p.256.

¹⁸² European Union Guidelines on promoting compliance with international humanitarian law [2005] OJ C327/04, at para. 12

¹⁸³ Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 Dec. 2005, General List No. 116, at para. 216. Also see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, General List No. 131[2004] ICJ Rep 136 at 178, para. 106.

¹⁸⁴ Democratic Republic of the Congo v. Uganda at paras 181 – 195.

¹⁸⁵ Democratic Republic of the Congo v. Uganda, para. 220.

territories using both IHL and HRL'.¹⁸⁶ More importantly, both sub disciplines of international law set of rules contain provisions for the treatment and protection of human beings based on considerations of humanity.¹⁸⁷ In this respect, IHL and HRL are mutually supportive regimes. This is based on the idea that there is considerable scope for reference to human rights law as a supplement to the provisions of the laws of war. For example, Article 72 Additional Protocol I recognizes that besides the rules expressed therein as well as in the Geneva Conventions IV which deal with the protection of civilian and civilian objects there are 'other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.'¹⁸⁸ Moreover, Article 75 Additional Protocol I lists a series of fundamental human rights guarantees for individuals who are in the power of a belligerent state.¹⁸⁹ More specifically, the ICRC Commentary invokes human rights law as a source of such 'applicable rules' as follows:

'[V]arious instruments relating to human rights spring to mind . . . In the first place, there is the Universal Declaration of 1948, but that Declaration represents, in its own words, a common standard of achievement for all peoples and all nations and does not constitute a legal obligation upon States. In the field under consideration here, there are three instruments binding the States which are Parties to them: a) the International Covenant on Civil and Political Rights; b) the European Convention for the Protection of Human Rights and fundamental freedoms; c) the American Convention on Human Rights.'¹⁹⁰

Moreover, violations of IHL will also lead to the criminal responsibility of the individuals who commit or order acts that amount to an international crime. ICL has developed as a primary means to enforce the laws of armed conflict. International crimes are acts which are prohibited by international law and which entail the personal criminal liability of the individual who has committed the act. These crimes may be created by rules of customary international law or by treaties. The personal criminal responsibility of the accused is

¹⁸⁶Odello, M. (2008), 'Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law', p.44. in Quénivet, N. & Arnold, R. (2008), 'International Humanitarian Law and Human Rights Law Towards a New Merger in International Law', *Martinus Nijhoff*, Leiden.

¹⁸⁷Bartsch, K.J. (1995) "Human Rights and Humanitarian Law" in Vol. II of *Encyclopaedia of Public International Law*.

¹⁸⁸ Article 72 of the Additional Protocol I.

¹⁸⁹ Article 75 of the Additional Protocol I.

¹⁹⁰ Sandoz Y, Swinarski, C and Zimmermann, B.(eds) (1996), 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949', *Geneva:ICRC- Martinus Nijhoff*, paras 2927–2928 .

created by international law independently of the provisions of national law, although national law may (and will often) incorporate and reflect the prohibitions established under international law. The relevance of ICL with IHL and IHRL based on the understanding that international criminal responsibility is imposed with respect to acts which are deemed to be of concern to the international community as a whole. The states parties to the Rome Statute of the ICC state in the preamble that they are conscious that all peoples are united by common bonds, their culture pieced together in a shared heritage, thus affirming that there are values that it is in the interests of the international community as a whole to preserve.¹⁹¹ Therefore, this will include violations of the law of armed conflict or serious breaches of human rights norms whether committed during armed conflict or not (e.g. torture, genocide and crimes against humanity).

IHRL, IHL and ICL are rooted in a similar ideal: respect for the autonomy and integrity of individuals and protecting individuals from misused state authority.¹⁹² They have been represented as circles or rings, each of which overlaps with the other two. Indeed, human rights treaties, such as the Torture Convention,¹⁹³ and humanitarian law conventions, such as the four Geneva Conventions,¹⁹⁴ contain provisions regulating individual criminal responsibility.¹⁹⁵ Conversely, ICL instruments, such as the Rome Statute of the International Criminal Court (ICC), contain provisions that draw upon both IHL¹⁹⁶ and IHRL.¹⁹⁷ The establishment and existence of ICC, together with two tribunals -ICTY and ICTR- is inherently a convergence of IHL and IHRL as the bodies combine characteristics of both branches of law.¹⁹⁸ Two of the greatest achievements of these institutions are the responsibility of individuals for violations of the law of war and their jurisdiction over a wide catalogue of

¹⁹¹ Broomhall, B. (2003) , ' International Justice and the International Criminal Court', Oxford University Press, Oxford, pp. 41.

¹⁹² Robinson, D. (2010)' The Two Liberalisms of International Criminal Law ' in Stahn, C. and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* , TMC Asser Press , The Hague, p. 117 .

¹⁹³ See Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

¹⁹⁴ The criminal provisions under the four Geneva Conventions are commonly known as the 'grave breaches ' : see, for instance, Art. 50 of the first Geneva Convention; Art. 51 of the second Geneva Convention; Art. 130 of the third Geneva Convention; and Art. 147 of the fourth Geneva Convention.

¹⁹⁵ Ratner, S.R., Abrams J.S. and Bischoff J.L. (2009), 'Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy', 3rd ed , Oxford University Press , Oxford 2009 , p. 13 .

¹⁹⁶ See, most notably, Art. 8 of the ICC Statute on war crimes.

¹⁹⁷ See, for instance, Art. 67 of the ICC Statute on the rights of the accused

¹⁹⁸ Abi-Saab, G. 'International Criminal Tribunals and the Development of International Humanitarian and Human Rights Law,' in *Liber Amicorum Judge Mohammed Bedjaoui*, 652.

crimes.¹⁹⁹ These achievements are both made possible through the merging of human rights and humanitarian law elements. The ICC statute does not criminalise violations of human rights in a formal sense, but only violations of international humanitarian law²⁰⁰ as is evident from the wording that 'all delegations agreed that the Court's jurisdiction relates to serious violations of international criminal law, not International Human Rights Law.'²⁰¹ However, if one considers the list of rights which are protected by the tribunals and the ICC it is apparent that they are derived from both IHRL and IHL. The genocide definition of the ICTR and ICC statute is taken from the human rights law of the 1948 Genocide Convention.²⁰² The statutes of all three bodies refer to the war crimes defined in the Geneva Conventions and their Additional Protocol I.²⁰³ The crimes listed in the statutes are indistinguishable from human rights, for example the prohibitions on wilful killing, torture, inhuman treatment and practice of apartheid.²⁰⁴ Similarly, the listed crimes clearly reflect the norms stated in common Article 3 of the Geneva Conventions and the rights constituting the crimes against humanity.²⁰⁵

For this purpose, the case law developed by the two International Criminal Tribunals is important tool that can help clarifying rules concerning the prohibition of arbitrary displacement. Therefore, the inclusion of ICL into this analysis aims for the identification of crimes under international jurisdiction relevant to the prohibition of forced and/or arbitrary displacement in situations concerning the IDPs. These international criminal tribunals have largely contributed to the ICL that is relevant for the issues under discussion in this chapter. The importance of the jurisprudence of the ICTY and ICTR for the scope of determining the content and applicability of the right not to be arbitrarily displaced resides particularly in the definition of international crimes as a result of forced displacement and the clarification of either individual or groups criminal responsibility for the acts of forced displacement. It is

¹⁹⁹ Benison, A. (1999) 'War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court.', 8 *Georgetown L.J* 141, pp. 158-159.

²⁰⁰ Meron, T. (2000) 'The Humanization of Humanitarian Law', *supra* note 181, p.265.

²⁰¹ Darryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference." *American Journal of International Law*, 93 (1999), 43-57, 53.

²⁰² Moghalu, C.K. (2002) 'International Humanitarian Law from Nuremberg to Rome : the Weighty Precedents of the International Criminal Tribunal for Rwanda.', *Pace international law review* 14, p.279.

²⁰³ See Article 50, 51, 129, 146 of the Geneva Conventions I, II, III, IV and Article 85 of the Additional Protocol I.

²⁰⁴ Meron, T. (2000) 'The Humanization of Humanitarian Law', *supra* note 181, p.266

²⁰⁵ *Ibid.*

believed that crimes under international law are relevant elements for determining the responsibility for gross human rights violations in situations of displacement.

In general, the inclusion of IHL, IHRL and ICL in the analysis aims at strengthening the practical protection from arbitrary displacement through the clarification of uncertainties in the application of existing standards in situations of internal displacement as a result of conflict and or gross human rights violations. Concerning the protection of IDPs from arbitrary acts of displacement, it should be noticed that the relevant principle in the Guiding Principles dealing with the 'prohibition from arbitrary displacement include provisions concerning the protection of IDPs' right not to be arbitrarily displaced in armed conflict situations²⁰⁶ and other situations i.e. generalised violence or situations of internal violence that fall short of armed conflict.²⁰⁷ Therefore, the right itself reflects IHRL and IHL provisions, depending on what kind of cases lead to displacement of people and such right, albeit not absolute, has its grounding on IHRL, IHL and ICL. While dealing with the prohibition of IDPs' from the arbitrary displacement, Kampala Convention imposes a duty on states to '[e]nsure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law'.²⁰⁸ Therefore, a stand-alone right not to be arbitrarily displaced by armed conflict and serious human rights violations exists in light of IHL, IHRL and ICL. These grounds give rise to the reason of analysing IHL, IHRL and ICL within the scope of the right not to be arbitrarily displaced. However, one can argue that how far one can borrow concepts from one sub-discipline and apply them in situations of IDPs so as to develop the law and analysis as it applies in that different context. This application of international law rules to analyse IDP rights is not a new approach in the literature. For example, Phuong's study draws heavily on IHL and IHRL to analyse IDP rights and provides an overview the applicable international law rules into IDP situations.²⁰⁹ ICRC conducted a study on how IDP rights protected under IHL while making references to IHRL.²¹⁰ Principle 28 of the Guiding Principles has been examined in the context of international law and it was argued that particular articles of IHL and IHRL are important in reinforcing this

²⁰⁶ See Principle 6(2)(b) of the GPID.

²⁰⁷ See Principle 6(2)(a) & (c) of the GPID.

²⁰⁸ Article 3(1)(g) of the Kampala Convention.

²⁰⁹ Phuong, C (2005), 'The international protection of internally displaced persons', *supra* note 14.

²¹⁰ ICRC (2018), 'Internally displaced persons and international humanitarian law', available at: <https://www.icrc.org/en/document/internally-displaced-persons-and-international-humanitarian-law>

Principle.²¹¹ More specifically, The Compilation and Analysis of legal norms applicable to IDPs shows the complementarity of the two bodies of law, IHL and IHRL: each alone does not provide sufficient protection for IDPs but, together, they have the potential to do so.²¹² Therefore, there is very good ground of using extensively major regimes of international law in order to examine the development of an IDP right. This approach will be taken in this chapter to analyse the right not to be arbitrarily displaced. As conflict creates displacement and displacement in turn spreads conflict, it is important to address how prohibition of forced displacement is regulated under international law and how the existing international rules responded to specific events that lead to the forced displacement of populations. Many provisions of humanitarian law aim to protect civilians from the effects of hostilities, especially against the risk of being uprooted. Prohibition of forced displacement in situations of armed conflict is well developed both in conventional and customary international humanitarian law.²¹³ However, when IDPs are caught in the middle of conflict, the characterisation of the conflict as international or non-international, and their relationship with the power whose hands they are in, is imperative in order to provide effective protection to them.

The protection issues pertaining to the prohibition of forced displacement of IDPs in armed conflict lie in the fact that forced displacement is carried out in situations qualified by the state concerned as 'internal disturbance' and thus excluded from the applicability of IHL. Therefore, in situations of internal violence that fall short of armed conflict, the applicability of IHRL continues and IDPs rely on this form of human right law for their protection from displacement. In principle, IHRL applies at all times, i.e. both in peacetime and in situations of armed conflict.²¹⁴ As stated by the Human Rights Committee (HRC) in its General

²¹¹ Kälin, W. & Chapuisat, E. H. (2018), 'Guiding Principle 28: The Unfulfilled Promise to End Protracted Internal Displacement', *International Journal of Refugee Law*, Vol 30, No 2, pp. 243–268.

²¹² Compilation Part-I (E/CN.4/1998/53/Add.1) and Part-II (E/CN.4/1998/53/Add.2) at the website of Office of the United Nations High Commissioner for Human Rights, Human Rights Documents, available at: https://ap.ohchr.org/documents/alldocs.aspx?doc_id=1160

²¹³ However, some legal scholars argue that the treaty provisions applicable in non-international armed conflicts are far less developed than those apply in international conflicts. For further discussion see Bugnion, F. (2004), 'Refugees, internally displaced persons, and international humanitarian law' volume 28/issue 5, *Fordham International Law Journal* 1397; Jacques, M. (2012), 'Armed Conflict and Displacement', *supra* note 29, pp. 49-77.

²¹⁴ ICRC (2010) 'IHL and human rights law' available at: <https://www.icrc.org/en/doc/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm>; also see: Human Rights Committee

Comment No. 31, both spheres of law (IHL and IHRL) are complementary and not mutually exclusive.²¹⁵ This approach will be adopted in this chapter for the purpose of examining what is an optimal protection of IDPs from forced displacement either in situations of armed conflict or in internal strife. To put it differently, as these two regimes are inter-related, their relationship can be used to strengthen the normative protection of IDPs from forced displacement, and overall, maximize their protection.²¹⁶

It should be born in mind that there is no fixed way to explain how a particular right should be interpreted when it is a matter of different branches of international law, and whether which branch is more specialized and accurate than others. As stated by the ICJ ‘some rights may be exclusively matters of . . . humanitarian law; others may be exclusively of human rights law; yet other may be matters of both these branches of international law.’²¹⁷ The right not to be arbitrarily displaced potentially can be a matter of IHL, IHRL and to some extent ICL depending on under which circumstances the displacement takes place and what legal justifications give rise to the order of displacement. This chapter will not focus on the complex relationship between different sub disciplines of international law. The scope of this chapter is to analyse the legal ground of the right not to be arbitrarily displaced in the relevant international law rules, taking into particular account Principle 6 of the Guiding Principles. The relevant provisions regarding the prohibition of arbitrary displacement under both regimes are: Article 49 of the Fourth Geneva Convention, Article 17 of the Protocol II Common Article 3 to the Four Geneva Conventions and the right to freedom of movement. In order to prevent the analysis becoming too broad and too generic in the sections that follow, the discussion will remain focused on these provisions which are deemed important for the development of the right not to be arbitrarily displaced.

,General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004.Eightieth session (CCPR/C/74/CRP.4/Rev.6

²¹⁵Human Rights Committee (2004) ‘the nature of the general legal obligations imposed on state parties to the covenant’ para.11 UN Doc. CCPR/C/21/Rev.1/Add.13.

²¹⁶ This approach is also adopted in the compilation and analysis of legal standards relevant to IDPs in the Guiding Principles of Internal Displacement, drawing on international human rights law, international humanitarian law and refugee law (by analogy). see Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 E/CN.4/1996/52/Add.2; also see Introduction of the Guiding Principle on Internal Displacement E/CN.4/1998/53/Add.2

²¹⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, July 9, 2004, I.C.J. Reports 2004, para. 106.

3.3. Forced Displacement of IDPs

Before discussing in detail how forced displacement can be interpreted under IHL, IHRL and ICL, it is first important to provide some background on the condition of forced displacement itself. The 2019 Global Humanitarian Overview reveals an astonishing severity in humanitarian crises, with an increasing number of people forcibly displaced by conflict in different parts of the world.²¹⁸ IHL uses a variety of terms that can collectively be referred to as acts of forced displacement, such as prohibition of individual transfers or mass forcible transfers, as well as deportations²¹⁹ and the displacement of civilian population.²²⁰ When we use the phrase ‘forced displacement of IDPs’, two key elements become relevant for the discussion that will be developing within the context of internal displacement: (i) the movement that takes place within the national boundaries of a state (ii) this is an involuntary or coerced movement.

For the former, the discussion on whether the ‘border-cross’ element exists becomes significant for the purpose of this analysis as it concerns internal displacement. Although the term ‘forced displacement’ may involve both deportation and forcible transfer of persons, the International Criminal Tribunal for the former Yugoslavia (ICTY) draw a distinction between them, based on where the displacement takes place. The Trial Chamber in *Prosecutor v Krnojelac* case found that deportation requires the displacement of persons across national borders, while forcible transfer takes place within national boundaries.²²¹ In this respect, rules prohibiting the forcible transfer of persons and also the case-law dealing with the forcible transfers are closely linked to the protection of IDPs from being arbitrarily displaced. The acts of forcible transfers can provide a better insight on whether the protection afforded to IDPs is sufficient to tackle their displacement-related issues. However, it is important to mention that, this border-cross distinction has no bearing on the condemnation of such practices in IHL.²²² What is more important under IHL is that the existence of the connection with an armed conflict rather than the existence of the border-

²¹⁸ United Nations Coordinated Support to People Affected by Disaster and Conflict ‘global humanitarian overview’(2019), p.4 available at <https://www.unocha.org/sites/unocha/files/GHO2019.pdf> [accessed 14 May 2019]

²¹⁹ Article 49(2) of the Fourth Geneva Convention.

²²⁰ Article 17(1) of Additional Protocol II.

²²¹ *Prosecutor v Krnojelac*, IT-97-25-T, Appeal Judgment, 17 September 2003, para.213.

²²² *Prosecutor v Krstić*, IT-98-33, Trial Judgment, 2 August 2001, para. 522.

cross element. Connection with an armed conflict makes the main differences between charging the acts of forced displacement as war crimes or as crimes against humanity. Under the category of war crimes, prosecuting authorities need to show the existence of the required *nexus with an armed conflict*, while under the category of crimes against humanity, forced displacement must be part of a *widespread and systematic attack* against a civilian population – there is no need to establish even the existence of an armed conflict.²²³ This requirement is a distinction under which category of international crime they should be assessed rather than where displacement takes place.

For the latter, the forcible character of displacement becomes legally significant in deciding whether the displacement is unlawful under international law. Therefore, the intention of the perpetrator and the consent of the persons forced to flee is of paramount importance in order to determine the voluntary nature of the displacement. The ICTY has contributed to a greater extent in the understanding of the elements of forcible displacement through its various judgments. In order to understand the existence of the element of coercion in forced displacement, as outlined in the *Krstić case*, the ICTY held that forcible displacement ‘is not limited to physical force but includes the threat of force or coercion, such as caused by fear of violence, duress, detention, physical oppression or abuse of power against such person or persons or another person or by taking advantage of a coercive environment’.²²⁴ The ICTY also noted in the case of *Prosecutor v Krnojelac* that ‘it is the absence of genuine choice that makes displacement unlawful’.²²⁵ Thus, forced displacement also means that people are moved against their will or without a genuine choice as a result of coercion. This coercion can be seen directly as a physical threat or indirectly as instances of the fear of violence. In this respect, a careful consideration of the specific circumstances involved must be carried out before reaching any conclusion as to what really counts as ‘genuine choice’ to leave. For instance, when a population are exposed daily to terror, mental and physical abuse, and rape, such circumstances create an environment where there is no choice but to

²²³ *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, paras 57-59 (*‘Kunarac et al. Appeals Judgment’*); see also *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, 15 May 2003, para. 518 and *Prosecutor v. Rutaganda*, Case No. ICTR-96-3 -A, Judgment, 26 May 2003, para. 563.

²²⁴ *Prosecutor v Krstić*, IT-98-33-T, Trial Judgment, 02 August 2001, para.529; *Prosecutor v Stakić*, IT-97-24-T, Appeal Judgment, 22 March 2006, para.281; *Prosecutor v Simić*, IT-95-9/2-S, Trial Judgement, 17 October 2002, para.125; *Prosecutor v Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para.475.

²²⁵ *Prosecutor v Krnojelac*, IT-97-25-T, Appeal Judgment, 17 September 2003, para.229.

leave, thus amounting to the forced displacement of people. Under these circumstances, even if there is no authority to force them to flee, they felt obliged to flee for safety reasons not as a choice but as an only option. In addition to the lack of consent of the people that are forced to flee, shelling of civilian objects or burning of civilian property also amount to forced displacement as these attacks demonstrate an intent to forcibly remove civilians from the area.²²⁶ In fact, these attacks imply intent that civilians are permanently displaced²²⁷ and this cannot be justified as pursuing a legitimate aim. Hence, forced displacement is associated with action that is not justified under international law. This reveals the importance of including the genuine choice for civilians because without the consent of individuals concerned, the displacement of persons is illegal.²²⁸

Furthermore, Stavropoulou took the discussion to a more IDP specific content and argued that the instances of the fear of violence or other violations of human rights are the evidences of coercion and these situations are considered as forcible displacement of IDPs.²²⁹ She further argues that the meaning of forced displacement of IDPs may have been incorporated in Article 17 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)²³⁰. These arguments are reasonable for two reasons. First, forced displacement in anticipation of a coercive environment is recognised in the Guiding Principles. According to Principle 6, which deals with the right not to be arbitrarily displaced, the prohibition of forced displacement includes situations of large development projects, man-made and natural disasters, ethnic cleansing and collective punishment.²³¹ These are the situations that are used in some cases as a deliberate strategy for the displacement of people without their consent. This does not mean that a state initiated a development project, for example, in order to cause displacement. It does mean however that in order for such a project to be realised, the state uses developmental progress and the narrative of economic prosperity as

²²⁶ *Prosecutor v Gotovina et al.*, IT-06-90, 15 April 2011, Trial Judgment (Volume 2 of 2), para. 2314. In this case, The Trial Chamber found that shelling of the towns constituted an unlawful attack on civilians and considered 'unlawful attacks the core indicator that crime of deportation had occurred.'

²²⁷ *Prosecutor v Naletilić & Martinović* (IT-98-34), Trial Judgment, 31 March 2003, para.520.

²²⁸ *Simić Case*, para. 125: "The displacement of persons is only illegal where it is forced, i.e. not voluntary, and "when it occurs without grounds permitted under international law"

²²⁹ Stavropoulou, M. (1994), 'The Right not to be Displaced', *supra* note 27, p.727.

²³⁰ Protocol Additional to the Geneva Conventions, 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609. (Protocol II)

²³¹ Principle 6(2) of the Guiding Principles.

the context for justifying and causing displacement if local populations are an obstacle to such a project. Even if the instances of direct physical force cannot be observed, these situations create the coercive environment for people to feel obliged to leave their places, and therefore generate the instances of the fear of violence. The instances of involuntary displacement, and therefore the lack of genuine choice to leave can also be seen in most cases of the conflict-induced internal displacement because the forced displacement of IDPs is more than a mere consequence of war; it can also be a deliberate strategy.²³² For instance, countless numbers of people in Myanmar, Kenya, Rwanda, and Bosnia-Herzegovina were forcibly moved by their governments for political or ethnic reasons. The genocide in Rwanda resulted in killing and forcible displacement of hundreds of thousands of Tutsis. When populations were mixed across a country (Hutu and Tutsi in Rwanda), the motivation of a campaign to eliminate ethnic rivals became apparent.²³³ In Myanmar, the State Law and Order Restoration Council has forcibly relocated ethnic minorities and political opponents and created an internally displaced population.²³⁴ In Bosnia-Herzegovina, millions of Bosniaks were displaced by ethnic cleansing campaigns.²³⁵ In Kenya, elections in 2007 led to political conflict between communities which caused displacement of large numbers of people.²³⁶ Most of the conflicts that lead to mass displacement have a strong ethnic and/or political component. Internal displacement can rarely be neatly categorised as having only one distinct cause. Political and ethnic reasons for displacement are unavoidably leads to conflict situations. Even in conflict situations in which ethnic or political reasons may not be apparent, it is a factor in most of the conflict-induced displacement. In this regard, it is important to assess forced displacement in a broader context and in cases in which persons feel obliged to leave because of impending conflict or other indirect coerced reasons for movement. In this regard, the meaning of forced displacement within the context of internal displacement includes coercion and/or

²³² see Analytical Report, *supra* note 43.

²³³ Wood, W. B. (2001). 'Geographic aspects of genocide: A comparison of Bosnia and Rwanda'. *Transactions of the Institute of British Geographers*, 26(1), pp.57–75.

²³⁴ Seekins, D. (2008). 'Forced relocation in Burma's former capital', *Forced Migration Review*, Issue 30.

²³⁵ For further detail see 'Dayton +20: Bosnia and Herzegovina twenty years on from the Dayton Peace Agreement', *Forced Migration Review* (2015), Issue 50, available at: <https://www.fmreview.org/dayton20>

²³⁶ IDMC (2020), 'Measuring the costs of internal displacement: Eswatini, Ethiopia, Kenya And Somalia', pp.22-30, available at: <https://www.internal-displacement.org/sites/default/files/publications/documents/202001-cost-of-displacement-africa-case-studies.pdf>

involuntary movement that is resulted as a direct physical force by military groups or state agents or indirectly as an instances of fear of violence such as threat, mental abuse, rape or burning of civilian property. Second, for the latter argument, movement related rights of IDPs in the Guiding Principles mostly inspired by the paragraphs of Article 17 of Protocol II.²³⁷ As the Protocol II deals with the situations of internal armed conflict, it provides an insight to the understanding of involuntary nature of internal displacement. The term ‘forced displacement’ in Article 17(1) of Additional Protocol II includes both displacements of the civilian population within the territory of a Contracting Party where a conflict is taking place and situations in which civilians are compelled to leave their places for reasons connected with the conflict. So that, this implies the involuntary or coerced nature of the displacement and also includes the displacement where it takes place within the territory of a single state.

In addition to Article 17 of Additional Protocol II’s relevance to the situations of internal displacement, this thesis argues that Article 49 of the Fourth Geneva Convention is also relevant for providing an insight to the understanding of the involuntary nature of internal displacement, and therefore contributes to the content of the right not to be arbitrarily displaced. It is acknowledged that there can be debate on the relevance of Article 49 of Fourth Geneva Convention as it applies to situations of international armed conflict. However, the conflict might be an international and armed one, but displacement can remain within national borders even if the borders are under challenge because of the conflict itself. The civilian population in the occupied territory may find themselves displaced within their own country while it is possible for them to be forced to leave their country by the conditions that have been created by the conflict itself. Indeed, Article 49(1), which will be analysed in detail in the next section, encompasses both deportations from and forcible transfers within the occupied territory. In many cases, the state that is subject to an international armed conflict may experience redrawing of borders or loss of sovereignty because it no longer has full authority, in legal terms. There are basically zones within the occupied country where sovereignty effectively does not exist. In this situation it is very difficult to assess whether the state to which the territory belongs has ceased to exercise its ordinary authority and whether to decide which authority is responsible on the

²³⁷see Kälin, W. (2008). ‘Annotations’, *supra* note 134., paras. 221-257.

protection of population. During occupation, there could be multiple types of displacement which may create both refugees and IDPs. In other words, forced displacement can take place both across and within the recognised national borders during an international armed conflict. As has been stated by the ICTY's Tribunal Chamber, deportation implies the displacement of persons across national borders²³⁸ which mean deportations create refugees. However, the forcible transfer of population has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries.²³⁹ Therefore, forcible transfers during international armed conflict can create IDPs. In this respect, state responsibility in the protection of IDPs can be found in the legal consequences of the acts of forcible transfers. The Appeals Chamber noted that Article 2(g) of the ICTY Statute, Articles 49 and 147 of Geneva Convention IV, Article 85(4)(a) of Additional Protocol I, and Article 18 of the 1996 International Law Commission (ILC) Draft Code all condemn forcible transfer.²⁴⁰ The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. Deportation and forcible transfer both entail the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law. In this respect, IDPs protection from forced displacement can be covered under Article 49 of the Fourth Geneva Convention which prohibits displacement to another state, within or from occupied territory.²⁴¹ Moreover, Article 85 of Additional Protocol I contributes to the IDP protection by prohibiting 'the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory in violation of Article 49 of the Fourth Convention.'²⁴² Focusing the acts of forcible transfers help us to reassess some aspects of the prohibition of forced displacement within the concept of IDP protection and thus strengthens the IDP protection. For instance, as IDPs are the citizens of their own country,

²³⁸ *Prosecutor v Krnojelac*, *supra* note 221, para.213.

²³⁹ *Prosecutor v Stakić*, IT-97-24-A, Appeal Judgement, 22.03.2006, para.317; *Prosecutor v Krnojelac*, *supra* note 221, para.213; ICL (1996), 'Draft Code of Crimes against the Peace of Security and Mankind', Report of the International Law Commission on the work of its 48th Session, UN Doc. A/51/10,100.

²⁴⁰ *Prosecutor v Stakić*, IT-97-24-A, Appeal Judgement, 22.03.2006, para.317.

²⁴¹ It provides that: "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

²⁴² Article 85 of the Protocol I.

how state's own nationals can be protected from forced displacement or can they be protected from forced displacement in situations of international armed conflict and how civilians can be protected from being forcibly displaced from their own government before occupation is established.²⁴³ The distinction between deportation and forcible transfer highlights how serious can forced displacement be when the displacement takes place within national boundaries during international armed conflict. Forced displacement of civilians can be used as a weapon of war by their own state during occupation. As has been confirmed by the Tribunal, the acts of forcible transfer are of similar seriousness to the instances of deportation, as they involved a forced departure from the residence and the community, without guarantees concerning the possibility to return in the future, with the victims of such forced transfers invariably suffering serious mental harm.²⁴⁴ Therefore, state responsibility is not only limited to the prohibition of displacements across a national border but also covers the prohibition of displacement within national boundaries. Furthermore, on several occasions, the Tribunal's Trial Chambers have found that the forced displacement of the population within a state constituted crime of persecution²⁴⁵, crimes against humanity²⁴⁶ and other inhumane acts.²⁴⁷ Displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under international law which also requires the individual responsibility for the acts of forcible transfers of displaced people. Criminal responsibility for the acts of forced displacement will be analysed in the following sections.

The possibility that displacement can be confined within the boundaries of a state is implicit in Article 49 of the Fourth Geneva Convention, while a clear prohibition of all forcible transfers, as well as deportations of protected persons from occupied territory, are included. The Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 clarified this implicit prohibition of displacement within an

²⁴³ These aspects will be touched upon in the next section.

²⁴⁴ In this connection, see *Blagojević and Jokić* Trial Judgement, para. 629; *Krstić* Trial Judgement, para. 523; *Kupreškić et al.* Trial Judgement, para. 566.

²⁴⁵ *Prosecutor v Krnojelac*, *supra* note 221, paras.217-222.

²⁴⁶ *Prosecutor v. Krajišnik*, IT-00-39-A, Appeal Judgement - 17.03.2009, para.388.

²⁴⁷ See *Krstić* Trial Judgement, para. 523; *Kupreškić* Trial Judgement, para. 566.

occupied territory. This Commentary interprets the wording in Article 49 paragraph 1 by noting that 'paragraph 1 also prohibits forcible transfers within occupied territory'.²⁴⁸

The Annotations of the Guiding Principles recognise that there is applicability of IHL provisions on prohibitions of forced internal displacement in international armed conflict, where such applicability can now be extended to internal displacement as well. In this respect, the applicability of Article 49, as it prohibits the forced displacement, is extended to cases of internal displacement. The Annotations of the Guiding Principles seek the legal foundations of the right not to be arbitrarily displaced because the prohibitions of displacement applicable to situations of international armed conflict are part of customary IHL.²⁴⁹ If we therefore follow the logic of the Guiding Principles we can see that even if Article 49 was not designed, because of the time of its draft, to deal with internal displacement, a connection to internal displacement can nevertheless be made. The applicability of Article 49 can be reassessed and reinterpreted, especially when this article is approached through the lenses of Principle 6. This process of reassessment allows us to see how forced displacement and its internal dimension need to be understood in terms of how they have evolved even before the Guiding Principles were established. Basically, Principle 6 (the right not to be arbitrarily displaced) opens a window through which we can go back to key provisions of IHL, like Article 49, and we can rethink those and see the extent to which they apply to current cases of IDPs. In this respect, this thesis argues that a link can be drawn between IHL and the Guiding Principles and this is explored in detail in the next section.

3.4. Prohibition of Forced Displacement under IHL

Following the definitions provided above regarding forced displacement of IDPs, the discussion now proceeds to examine how forced displacement is treated under IHL in order to identify the potential links with the right not to be arbitrarily displaced, as well as to discuss how the latter entails legal grounds that can be identified in IHL. This examination

²⁴⁸ Sandoz Y, Swinarski, C and Zimmermann, B.(eds) (1987), 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949', *Geneva:ICRC- Martinus Nijhoff*, p.1000.

²⁴⁹ Kälin, W. (2008). 'Annotations', *supra* note 134., p.27.

also helps understand how the existing understanding of forced displacement under IHL can be potentially enhanced in terms of applicability when re-interpreted through the context of the right not to be arbitrarily displaced.

3.4.1. Forced Displacement and International-Armed Conflict

The first central understanding of forced displacement under IHL concerns the connection with international armed conflict because this type of conflict also creates IDPs. There are therefore important articles in this area of IHL that are relevant to the right not to be arbitrarily displaced. Taking into account that the phenomenon of internal displacement often is correlated with conflict, the 1949 Geneva Conventions and their Additional Protocols were an important source for the Guiding Principles. The Geneva Conventions of 1949 and their additional protocols expressly prohibit the forced displacement of populations in international and internal armed conflicts. Thus, relevant IHL rules deriving from the Fourth Geneva Convention and its additional protocols on the prohibition of forced displacement, imply the devastating effect of displacement and the necessity of preventing it.

In situations of international armed conflict, Article 49 (1) of the Fourth Geneva Convention lays down a clear prohibition of deportations and forcible transfers from occupied territory as '[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive'.

It is clear from this paragraph that deportations and forcible transfers are prohibited under Article 49(1), regardless of their motive.²⁵⁰ Deportations and forcible transfers are illegal, irrespective of their motive or justification, and forced transfer and deportation of civilians from occupied territories are also illegal, notwithstanding the collective or individual character of the movement. However, the interpretation of absolute prohibition on forced

²⁵⁰ Piotrowicz, R. (2007), 'Displacement and displaced persons' in Wilmshurst, E. & S. Breau, (Eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, p. 342.

transfer and deportation of civilians is different in ICRC Study on Customary IHL,²⁵¹ and prohibited forced transfer and deportations unless the security of the civilians involved or imperative military reasons so demand. This interpretation is addressed under Rule 129 (A) as:

‘Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.’

However, the wording of the Rule has been criticised as unfortunate because it potentially justifies deportations and forcible transfers because of the need to ensure the security of the civilian or imperative military reasons.²⁵² It is widely accepted that Article 49 has a well-established customary law status.²⁵³ According to Article 49 (1), the prohibition of forced displacement of civilians in international armed conflict is absolute (regardless of its motive), and firmly established and binding on all states. This criticism clearly highlights the problem of softening of the already accepted absolute prohibition of forced displacement in international armed conflict. This may open a floor to a state’s own interpretation and the use of these exceptions for their own political motives.

However, it should be noted that the prohibition is absolute and allows for no exceptions, but this absolute standard applies only to ‘forcible’ or involuntary displacement.²⁵⁴ This, in fact, implies that some kinds of population transfers may be permissible under certain circumstances. This is stipulated in the second paragraph of Article 49, which states as follows:

²⁵¹ International Committee of the Red Cross, Customary International Humanitarian Law, 2005, Volume I: Rules (hereinafter ICRC Study on Customary IHL), Commentary on Article 49 available at: <https://www.refworld.org/docid/5305e3de4.html> [accessed 2 May 2019].

²⁵² Piotrowicz, R. (2007), ‘Displacement and displaced persons’, *supra* note 250.

²⁵³ Accordingly, the drafters of the Geneva Convention IV voted unanimously in favour of the prohibition of forced displacement provided in Article 49. see Henckaerts, J.M. & Doswald-Beck, L. (2005), ‘Customary International Humanitarian Law’, Volume I: Rules,), *International Committee of the Red Cross*, Commentary on Article 49 available at: <https://www.refworld.org/docid/5305e3de4.html> [accessed 2 May 2019] ; The four 1949 Conventions have been ratified by 194 states which makes the Geneva Conventions universally applicable. See https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380 [accessed 2 May 2019].

²⁵⁴ Pictet J. (1958), ‘Commentary on the Geneva conventions of 12 August 1949 Convention relative to the protection of Civilian Persons in Time of War’, Geneva, ICRC, p.279; also available at: <https://ihl-databases.icrc.org/ihl/INTRO/380>

‘the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.’

Evacuations are referred to as the exception of Article 49 paragraph 1²⁵⁵ and may only be carried out in two exceptional circumstances: military necessity and security of the civilian population. The justification of these two exceptional circumstances relate to the interest of the population concerned and is also aiming to prevent abuses by the occupying power.²⁵⁶ Two safeguards of the evacuations are particularly relevant to the scope of this thesis. As stipulated in Article 49 (2): ‘such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.’

First, this paragraph clearly shows that evacuations are intended as temporary measures for the safety of the population concerned. Second, evacuations may not involve the displacement of the protected persons to places outside the occupied territory, unless it is physically impossible to do otherwise.²⁵⁷ Indeed, the displacement within the occupied territory creates IDPs until the hostilities in the area have ended. This raises the question: if displacement is unavoidable, does Article 49 place a duty on the occupying power to mitigate the adverse effects of displacement on those displaced people? Paragraph 3 of Article 49 in this respect, provides an answer and imposes a duty to the occupying power to provide proper accommodation and satisfactory conditions in terms of hygiene, health, safety and nutrition. In the words of the Convention itself:

‘The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated’.

When interpreting this part, it appears that these conditions may help us to assess the legality of displacement. If an evacuation does not meet the requirements set out in

²⁵⁵ Ibid. p.279.

²⁵⁶ Ibid.p.280-281.

²⁵⁷ bid.p.280.

paragraph 3 of Article 49, this also may constitute a form of arbitrary displacement. Therefore, the interpretation of this Article also helps us to assess the obligation of states for the protection of displaced people during displacement. This, therefore, can provide an insight on the measures that a state should take to refrain from acts of arbitrary displacement.

When we look at Article 49's relevance to the protection of the right not to be arbitrarily displaced the following observations become evident.

Article 49 prohibits deportation and forcible transfer only from occupied territory, and there seems to be a legal gap because forced displacement in unoccupied territory is not regulated.²⁵⁸ In conflict situations, civilians in the areas controlled by their own government are being deliberately displaced, which make displacement a weapon and sometimes even their goal. In this respect, Article 49 does not seem to protect from forced displacement carried out before occupation is established. Having considered the weaker emphasis on addressing the root causes of displacement, rather than solutions following the uprooting of individuals, IDPs' protection from forced displacement can be seen very problematic in this protection gap.

Moreover, Article 49 prohibits the occupying power from transferring its own population into the occupied territory,²⁵⁹ which seems to provide an understanding of IDP's protection from forced displacement as being part of the responsibility that a state has towards its own nationals. This obligation, unlike in the case of evacuation, allows no exception and hence no military necessity may justify such population transfer. However, apart from its first paragraph, which expressly prohibits the deportation and forcible transfer of civilians, Article 49 is not applicable to a state's own nationals. Following the same logic, one commentator is of the view that IHL is based on the premise that civilians do not need special protection from their own government in times of war.²⁶⁰ Nonetheless, since new forms of violent conflict have emerged after 1991 to take the place of traditional wars, a broader implementation and interpretation of IHL rules is needed. Some academic writers

²⁵⁸ Jacques, M. (2012), 'Armed Conflict and Displacement', *supra* note 29, p.22.

²⁵⁹ Article 49 of the Fourth Geneva Convention: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' It is also prohibited under Article 85(4) of the Protocol I.

²⁶⁰ Jacques, M. (2012), 'Armed Conflict and Displacement', *supra* note 29, p.37.

support the view that states' own nationals are entitled to the protection of Article 75 of the Protocol I, which provides 'fundamental guarantees to 'all persons who are in the power of a Party to the conflict who do not benefit from more favourable treatment' under the Geneva Conventions or the Protocol.²⁶¹ The Eritrea-Ethiopia Claims Commission shared the same view and held that Article 75 applies even to a Party's treatment of its own nationals.²⁶² The idea behind incorporating the above-mentioned paragraph of Article 75 on the prohibition of forced displacement is to provide effective protection to all affected persons including state's own nationals. However, the lack of specific protection from displacement for states' own nationals still continues, as the application of Article 75 is limited to international armed conflict. The question on the protection from displacement for states' own nationals in non-international armed conflict remains unanswered especially because of the more complicated nature of conflicts after 1991. In this situation, the protection provided by international and regional human rights law should provide continuous protection where the protection offered by IHL is unavailable as in the case of a state's own nationals. Hence, this situation highlights the need for an explicit mention to the right not to be arbitrarily displaced that is applicable to both situations of armed conflict and in peacetime as well in international law. This right addresses the root causes of displacement and the protection of state's own nationals. Overall, the way forced displacement is understood in IHL has some gaps which potentially can be filled by the definition and the application of the right not to be arbitrarily displaced. At the same time, it becomes evident from the analysis above that the legal grounds of this right necessarily need to include the area of international armed conflict under IHL.

3.4.2. Forced Displacement and Non-International Armed Conflict

The second area of IHL that is significant for identifying the legal grounds of the right not to be arbitrarily displaced concerns non-international armed conflict. Since non-international armed conflict is also an important part of IHL, this section moves to examine how forced

²⁶¹ Gasser, H.P. (1995), 'Protection of the civilian population' in Fleck, D ed, 'The Handbook of Humanitarian Law in Armed Conflicts', *Oxford University Press*, p. 233.

²⁶² Eritrea-Ethiopia Claims Commission - Partial Award: Civilian Claims - *Eritrea's Claims* 15, 16, 23 and 27-32 (17 December 2004), para. 30.

displacement is understood in this type of conflict and how the protection is afforded to civilians from being forcibly displaced. In addition to the provisions described above, civilians are also protected against displacement that occurs in internal armed conflict but the situation concerning the state's own nationals remains vague and problematic. The reason why the focus on the protection of state's own nationals is important is because IDPs are the nationals of their own government. Additional Protocol II expressly prohibits the displacement of the population. This is the first time that a binding instrument explicitly mentioned the prohibition of displacement in internal armed conflicts.²⁶³ Article 17 of Additional Protocol II provides that:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

The content of these paragraphs was made clear in the case of *Prosecutor v. Milošević*. The first paragraph covers displacements of civilians within the territory of a state where a conflict is taking place, while the second paragraph deals with displacement where groups of civilians were subject to expulsion across national boundaries.²⁶⁴ Therefore, the protection of IDPs builds on Article 17 paragraph 1 as the displacement takes place within the national borders of a state. In addition to that, Principle 6 (IDP's right not to be arbitrarily displaced) of the Guiding Principles reflects the existing international law, particularly reflects Article 17(1) of the Protocol II in terms of prohibiting forced displacement.²⁶⁵ Article 17 further stipulates that forced displacement is prohibited except where necessary for the safety of the population or for imperative military reasons. The wording of this paragraph is based on Article 49(2) of the Fourth Geneva Convention, which

²⁶³ Jacques, M. (2012), 'Armed Conflict and Displacement', *supra* note 29, p.51.

²⁶⁴ *Prosecutor v. Milošević*, IT-02-54-T, Decision on motion for judgment of acquittal, 16 June 2004, para.55.

²⁶⁵ see Kälén, W. (2008). 'Annotations', *supra* note 134., paras. 221-257.

deals with evacuations. According to this paragraph evacuations may be permissible on grounds of civilian security or military reasons while the prohibition of deportation and forcible transfer remain non-derogable. It is inferred from these provisions that displacement is the exception not the rule.

It is highly likely that the absence of an absolute prohibition of forced displacement in internal armed conflicts is linked to state's claims regarding their sovereignty rights, as states are not willing to undertake the same commitment in the case of non-international armed conflict particularly in the case of internal strife.²⁶⁶ However, allowing an exception for security or military reasons may be easily abused to justify their unlawful practices of forced displacement. So, for this reason justifications given for the population movements need to be assessed whether the basic needs such as shelter, food, security are provided and whether it is a temporary measure necessary to protect the population from the conflict. While assessing the rights of IDPs to protection from arbitrary displacement, the UN Office for the Coordination of Humanitarian Affairs (OCHA) has interpreted the relevant paragraphs of Additional Protocol II Article 17 and Fourth Geneva Convention Article 49 to the effect that 'the burden is on the warring party to make the case that population movements are justified'.²⁶⁷

Indeed, unlike the provisions of international armed conflicts, there is not an absolute prohibition of forced displacement that exists in the provisions of non-international armed conflict. The reason for the evidence of relatively softer language in the provisions of non-international armed conflicts dates back to the drafting process of Additional Protocol II. Oppositions to the some aspects of Protocol II were strong during the drafting process, which underlines the fear of developing nations that the concept of Protocol II would encourage intervention in their domestic affairs.²⁶⁸ These aspects are the definition of internal armed conflict, i.e. whether internal disturbances such as riots or isolated acts of

²⁶⁶ In fact, this is the reason why the provisions applicable in non-international armed conflicts are far less developed than those that apply in international conflicts. For further discussion see Bugnion, F. (2004), 'Refugees, internally displaced persons, and international humanitarian law' *supra* note 213, p.1406.

²⁶⁷ OCHA (1999), 'Handbook for applying the guiding principles on internal displacement', *Brooking Institution Project on Internal Displacement*, p.16.

²⁶⁸ Moir, L. (2002), 'The Law of Internal Armed Conflict', *Cambridge University Press*, p.95.

violence are considered as internal armed conflict,²⁶⁹ and what is the role of an authoritative body such as ICRC in helping with the observance of the provisions.²⁷⁰ In the end, no mention is made of the ICRC and only one article (Article 18) reference to relief societies and relief actions was retained. In fact, the fear of interference in states' domestic affairs is a broad concern shared by many states, including but not limited to developing countries, and that has been inherited to discussions regarding the protection of IDPs even today. Still today, there is no single agency or organization that has been designated as the global authority on the protection and assistance of IDPs, and this lack of organisation is largely fuelled by the resistance of states to participate in an international organisation that potentially has the authority to monitor their internal affairs. An additional problem that remains evident today is that states are reluctant to consider different types of conflict within their territory as internal armed conflict, and since these types of conflict produce high numbers of IDPs, these IDPs, even if recognised as such, cannot be considered as victims of an internal armed conflict, and therefore Additional Protocol II and its protective measures does not apply to them. Because of the requirement of witnessing a high intensity of conflicts in order to justify the very notion of armed conflict, IDPs who are caught in conflict of lesser intensity do not enjoy the full legal protection they are entitled to under Additional Protocol II as civilians. More specifically, Article 1(1) of Additional Protocol II, concerning the material field of application of the Protocol, states what is meant by internal armed conflict as: Protocol II applies to all armed conflicts which are not covered by Article 1 of Protocol I and that 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' The next paragraph clarifies that 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are not armed conflict and Protocol II therefore inapplicable to such situations. This shows how complex character of conflicts leads to the political sensitivity and also leads states to be sensitive to

²⁶⁹ For instance, Indian delegate Mr. Sood argued that the definition of non-international armed was still vague and the application of draft Protocol II to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of a State. See Moir L. (2002), 'The Law of Internal Armed Conflict', *supra* note 268, pp.95-97.

²⁷⁰ *Ibid.*

internal conflicts. In fact, it is highly likely to see the examples of the refusal of the government concerned to formally acknowledge the applicability of Additional Protocol II to the situations of conflict which is occurring within their territory that has reached the proportions of armed conflict such as protracted and/or widespread hostilities. Accordingly, as rightly and clearly expressed by one commentator: 'It would have been far better if the normative progress made by Protocol II had been accompanied by the lower threshold of applicability of Common Article 3, but this was not politically feasible.'²⁷¹ Given the frequency and cruelty of conflicts, the government's denial of the existence of an internal armed conflict in terms of Additional Protocol II clearly complicates the protection of IDPs who are caught in situations of riots or internal tensions. In such situations of internal violence that fall short of armed conflict, individuals may only rely on human rights law for their protection from forced displacement. However, existing human rights which will be discussed in the following sections, do not contain an explicit prohibition of forced displacement. This also shows the need to explicit recognition of the right not to be arbitrarily displaced as it prohibits expressly the arbitrary displacement.

Another point that needs to be highlighted is the 'order of displacement'. It has been pointed out that the wording of Additional Protocol II Article 17(1), *prima facie*, prohibits the order to displace the civilian population rather than the displacement itself.²⁷² However, the substance of Article 17(1) is understood as to prohibit the displacement itself, not merely the order. This interpretation finds support in terms of subsequent practices. For instance, while Article 17(1) refers to ordering of displacement, there are instances of practice such as condemnation by UN organs²⁷³ and states²⁷⁴ that implemented the prohibition of forced displacement in non-international armed conflict regardless of

²⁷¹ Meron, T. (1987), 'Human Right in Internal Strife: Their International Protection', University of Cambridge Research Centre for International Law, *Grotius Publications Limited*, p.47.

²⁷² Piotrowicz, R. (2007), 'Displacement and displaced persons', *supra* note 250, p.347.

²⁷³ For instance UN General Assembly condemned ethnic cleansing in its resolution concerning armed conflict in Bosnia-Herzegovina as a violation of IHL without discussing the question of whether or not forced displacement had been ordered. UNGA Res 46/242, UN Doc. A/RES/46/242. See also UN Doc. S/RES/1556/24, UNGA Res. 50/93 for a detailed discussion see Willms, J. (2009), 'Without order, anything goes? the prohibition of forced displacement in non-international armed conflict', Volume 91/issue 875, *International Review of the Red Cross* pp. 555-57.

²⁷⁴ Mali, Penal Code (2001), Article 31(g) and (i)(8); Nicaragua, Military Penal Code (1996), Article 58; Niger, Penal Code as amended (1961), Article 208.3(6); Slovenia, Penal Code (1994), Article 374(1); Colombia, Penal Code (2000), Article 159; Coˆte d'Ivoire, Penal Code as amended (1981), Article 138(3); Canada's Law of Armed Conflict (LOAC) Manual (2004), p. 17-6.

whether the displacement was ordered or not. Therefore, it could also be argued that substantial practices suggest that 'order' is not regarded as necessary to find a violation of Article 17(1) given the fact that the displacement itself constitutes a breach of IHL. Otherwise, civilians who are coerced to leave an area through indirect means (such as indiscriminate attacks) rather than through an order would not be considered as forcibly displacement. Thus, requirement of an order would encourage governments to use indirect means of coercion to displace the civilians. As stated in its Preamble, one of the objects and purposes of Protocol II is to ensure a better protection for the victims of armed conflict. For this purpose, if requiring an order is interpreted in good faith, government would also accept indirect means of coercion to assess the unlawfulness of displacement of civilians.²⁷⁵ If it were not the case, states would be in a position to claim that forced displacement had not been ordered even if the causes of forced displacement constitute the element of coercion. For this reason, it is assumed that the prohibition of 'ordered displacement' in Article 17(1) implies the same meaning as forced displacement which includes the elements of involuntary movement and direct or indirect means of coercion. It may be feasible to include also discriminatory acts as a coercion, which creates an environment of fear. Indeed, the right not to be arbitrarily displaced prohibits the displacement when this is based on ethnic, religious, or racial grounds. This can also help us to assess discriminatory acts as a form of coercion, and therefore as forced or arbitrary displacement. This contribution also explains the need for an explicit right not to be arbitrarily displaced.

However, despite the growth in the number of internal conflicts, the practical application of Additional Protocol II is relatively low compared to the rules applying to the situations of international armed conflicts²⁷⁶ and it has not gained universal acceptance.²⁷⁷ This requires the need for examining the customary rules that are applicable to the situations of internal armed conflict which are binding on all parties to an armed conflict, irrespective of state ratification. Thus, the discussion of this chapter may be expanded on how far customary IHL applicable to international armed conflicts also applies to non-international armed conflicts.

²⁷⁵ Willms, J. (2009), 'Without order, anything goes?', *supra* note 273, p.551.

²⁷⁶ Moir argues that there are four states that struck by internal armed conflict have indicated their willingness to be bound by the provisions of Additional Protocol II. These countries are El Salvador, Rwanda, Bosnia-Herzegovina and Russia. For further discussion see Moir, L. (2002), 'The Law of Internal Armed Conflict', *supra* note 268, pp. 120-132.

²⁷⁷ As of September 2020, 169 states were parties to Protocol II. See ICRC Treaty database, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475> [accessed 26.09.2020]

It is widely accepted that most customary rules on the conduct of hostilities apply to all armed conflicts, be they international and non-international.²⁷⁸ Therefore, it is now possible to speak of a comprehensive body of rules that are applicable in all instances of armed conflict. A similar statement can be found in the Commission on Darfur's Report as 'internal armed conflicts are governed by an extensive set of general rules of international humanitarian law'.²⁷⁹ Certain fundamental principles of IHL that are applicable to international armed conflicts have developed to the stage where they can be considered customary in non-international armed conflicts. These include the principle of distinction, including the prohibition on indiscriminate attacks, the requirement of proportionality, including the principle of military necessity, and the prohibition on employing means of armed conflict which cause unnecessary suffering.²⁸⁰ When we look at the prohibition of forced displacement, according to the Fourth Geneva Convention and Additional Protocol I, it is a grave breach of these instruments to deport or transfer the civilian population of an occupied territory, unless the security of the civilians involved or imperative military reasons so demand and it is acknowledged that Article 49 of the Fourth Geneva Convention and Article 85(4)(a) of the Additional Protocol I (adopted by consensus) have customary law status.²⁸¹ In addition, deporting or transferring all or parts of a State's own civilian population of the occupied territory within or outside this territory is a grave breach of Article 85(4)(a) of Additional Protocol I.²⁸² The cases concerning the forcible displacement of state's own nationals within the territory is closely linked to the IDP protection as this situation creates IDPs. Therefore, the customary aspects of the Additional Protocol I might be applicable to the protection of IDPs. However, provisions of the Additional Protocol I are applicable to the international armed conflicts and it is important to assess how far these customary aspects of the Additional Protocol I can be applicable to non-international armed conflict. The answer to this question depends on the many variables such as the reason for

²⁷⁸ see Henckaerts, J.M. & Doswald-Beck, L. (2005), 'Customary International Humanitarian Law', Volume I: Rules,) *supra* note 253.

²⁷⁹ Report of the UN Commission of Enquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September; Geneva, 25 January 2005; para. 162.

²⁸⁰ See generally Customary International Humanitarian Law', Volume I: Rules, Volume 2: Practice.

²⁸¹ ICRC, Customary IHL Database Rule 129 'The act of displacement', available at : https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule129

²⁸² Article 85(4)(a) : 'the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention'

the displacement, the perpetrator or under which circumstances have these acts taken place. For this reason, the applicability of the customary aspects of the Additional Protocol I need to be assessed on a case-by-case basis.

The discussion of this chapter may also be expanded to whether the prohibition of forced displacement contained in Article 17 of Additional Protocol II constitutes a customary norm of IHL. This examination can provide an insight on whether Additional Protocol II is applicable without state recognition. Even if a clear answer cannot be provided, examining the customary rules on prohibition of forced displacement in situations of internal armed conflict can provide a broader view on how displacement is dealt with in this situations and how displaced people are protected. In this sense, Common Article 3 to the Geneva Conventions is applicable to conflicts not of an international character and has a well-established customary law status.²⁸³ Thus, the discussion of this chapter may be expanded to whether the prohibition of forced displacement contained in Article 17 of Additional Protocol II constitutes a customary norm of IHL since it is explicitly stated in Additional Protocol II Article 1 that Protocol II develops and supplements the provisions of Common Article 3 to the four Geneva Conventions. Common Article 3 is applicable to conflicts not of an international character and it stipulates the duty of ‘each Party’ to a non-international conflict to treat all those ‘persons not taking part in hostilities humanely without adverse discrimination on grounds of race, colour, religion or faith, sex, birth or wealth or any other similar criteria.’ It may be argued that forced displacement does indeed constitute treatment in violation of this obligation mentioned in common Article 3. As discussed above, Since Additional Protocol II clarifies and strengthens common Article 3’s customary law rules, it is reasonable to argue that Additional Protocol II’s relevant provisions should also be regarded as declaratory of customary law. This view is also supported by the ICTY in the *Tadić case* as follows:

Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.²⁸⁴ Those provisions of the Protocol II

²⁸³ The Geneva Conventions have a well-established customary law status; that includes common Article 3 to the Geneva Conventions.

²⁸⁴ *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, para.117. available at <https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic>

that merely restate or elaborate on Common Article 3 are part of customary international law. However, this cannot prove the customary status of all provisions of Protocol II as a whole, including Article 17.

Nonetheless, the basic core of Additional Protocol II is reflected in Common article 3, therefore we can still examine the prohibition of forced displacement in non-international armed conflicts as a customary norm of international law. For this purpose, when we look at the application of Common Article 3 in cases of forced displacement, the existence of 'conflicts not of an international character' needs to be determined. The ICTY defined non-international armed conflict in the *Tadić case* as 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'²⁸⁵ Thus, the Appeals Chamber saw the sole requirement for the existence of an internal armed conflict as being a state of protracted armed violence, involving organised non-governmental armed groups. Nevertheless, ICTY and the International Criminal Tribunal for Rwanda (ICTR) have different approaches on assessing whether internal armed conflict exists. ICTY's above mentioned decision on *Tadić case* has been seen as authoritative in subsequent ICTY cases.²⁸⁶ Nonetheless, ICTR stated in *Rutaganda case* as ICTY Appeals Chamber offered definition is 'termed in the abstract, and whether or not a situation can be described as an armed conflict, meeting the criteria of Common Article 3, is to be decided upon on a case-by-case'.²⁸⁷

Taking into consideration the ICTY Appeals Chamber's definition of the term 'armed conflict' in the *Tadić case*, Moir argues that the Appeals Chamber provides a fairly wide interpretation of 'internal armed conflict' and the threshold for the application of common Article 3 is relatively low because even the government does not need to be a party to the conflict within a state at all.²⁸⁸ However, this perceived low threshold of Common Article 3 does not seem to be an advantage in terms of protection of civilians from forced displacement for two reasons. First, the requirement that the violence must be protracted is

²⁸⁵ *Prosecutor v Tadić, Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, ICL 36 (ICTY 1995), 2 October 1995 p.70.

²⁸⁶ *Prosecutor v. Delalić et. al*, IT-96-21-T, 16 November 1998, para. 183; *Prosecutor v. Furundžija* (IT-95-17/1), 10 December 1998, para. 59.

²⁸⁷ *Prosecutor v. Rutaganda*, ICTR-96-3, Judgment of 6 December 1999, para. 93.

²⁸⁸ Moir, L. (2002), 'The Law of Internal Armed Conflict', *supra* note 268, p.43.

subjective, thus it possibly leads to restrictive interpretations in deciding the duration of a conflict or it can even result in failure to apply the relevant provision of Common Article 3. Second, the term 'protracted armed violence' hints that it must have reached a certain level of intensity so this requirement would preclude internal disturbances from amounting to internal armed conflict as in the case of the application of Additional Protocol II because internal strife or disturbances do not amount to an armed conflict and are expressly excluded from the scope of Protocol II.²⁸⁹

In times of tensions and disturbances, IDPs are particularly vulnerable, as they find themselves inadvertently caught up in the middle of a conflict. It has been observed that force is frequently used within states' own territory and against its own citizens rather than employing force in its relations with other states²⁹⁰ and displacement of civilians is the consequence of these acts in most of the cases. The negative impact of internal disturbances on civilians cannot be ignored and the protection needs to be provided. This may require looking at the cases of internal disturbances from a different perspective. More specifically, as Cassese points out, there has been a gradual blurring of the distinction between the customary international law rules governing international conflicts and those governing internal conflicts, with the result that internal strife is now governed to a large extent by the rules and principles that had traditionally applied only to international conflicts.²⁹¹ There are four factors behind this convergence: (1) the increase in the number of civil conflicts; (2) the increase in the level of cruelty of internal conflicts; (3) the increasing interdependence of States; and, (4) the influence of universal human rights standards.²⁹² This indeed shows the influence of internal disturbances on how new perceptions of conflicts emerge and how states re-assess what conflicts are and what are the appropriate and needed responses to such conflicts. However, this should not be interpreted as a process leading to extensive overlap between these two regimes as there are major limitations remaining and this transition is still incomplete. Nevertheless, even this

²⁸⁹ Protocol II, Article 1(2): 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.

²⁹⁰ Moir, L. (2002), 'The Law of Internal Armed Conflict', *supra* note 268, p.34.

²⁹¹ Memorandum to Members of The Preparatory Committee on The Establishment of an International Criminal Court Date: 22 March 1996 From: President of the ICTY Antonio Cassese, para 11. available at: <http://iccnow.org/documents/Memorandum.pdf>

²⁹² Cassese further argues that this blurring of the distinction is not, however, without limitation. *Ibid.* para.11.

moderate convergence is sufficient to create important implications for IDPs. Two of the aforementioned factors for convergence, the increase in the level of cruelty of internal conflicts and the influence of universal human rights standards, are also accepted as the justification for the international protection of IDPs.²⁹³ With regard to the former factor, the connection made in the Guiding Principles in the increase in the intensity of conflicts and the need for greater IDP protection is an important turning point that allows for international considerations of conflict to now be understood as also having important implications for IDP populations. Greater intensity of conflict also has ramifications for the human rights of IDPs. The importance of human rights of victims of conflict is also supported in the *Tadić case* where the Appeals Chamber dealt with the question of how protection is provided when armed violence has erupted 'only' within the territory of a sovereign state. The Chamber stated that:

'If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy (armed conflict between sovereign States and armed violence breaking out in the territory of a sovereign State) should gradually lose its weight.'²⁹⁴

The protection of human rights of civilians has the primary importance among the provisions regarding armed conflicts regardless of their application in international or non-international armed conflicts. However, when we look at the movement-related rights of civilians, two shortcomings of Common Article 3 in situations of internal violence are limiting the effective protection of these rights. These shortcomings are clearly elucidated by the Secretary General in his report to the Commission on Human Rights.²⁹⁵ First, Common Article 3 provides only a minimum of protection²⁹⁶ and it is silent on issues relating to freedom of movement. Second, it does not define 'armed conflicts not of an international character', and indeed leaves room for governments to contest its applicability in practice. In other words, it is always open to states to claim that the criteria of an internal armed

²⁹³ see Introduction of the Guiding Principles

²⁹⁴ *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, ICL 36 (ICTY 1995), 2 October 1995 p.97.[emphasis added]

²⁹⁵ Commission on Human Rights, Fifty-fourth session, 'Report of the Secretary-General on the minimum humanitarian standards' E/CN.4/1998/87, para 74.

²⁹⁶ Article 3 to the Four Geneva Conventions: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the provisions.'

conflict have not been met, thus preventing the application of IHL. Apart from case law, the ICRC's Rules concerning displaced populations (Rules 129-133) are a welcome contribution to strengthen the protection of those who are forced to leave their home because of conflict, irrespective of whether they are crossing an international border or not. However, these Rules have been criticised for not making any further distinction between refugees and internally displaced persons.²⁹⁷ In fact, the ICRC's Customary Study explicitly declares at the beginning of the above mentioned rules that they cover the treatment of both IDPs and refugees. Unfortunately, evidence for customary protection for IDPs is scarce along with the subsequent paragraphs and this has led to the concentration on refugee protection.²⁹⁸ The coverage may need to be expanded to provide more effective protection for IDPs and explicit mention to the right not to be displaced would contribute towards meeting the protection needs of these people.

The discussion in this section shows that IHL on non-international armed conflict is strongly relevant when identifying the legal grounds of the right not to be arbitrarily displaced. When we also take into account the finding of the previous section on international armed conflict, it can be argued that IHL as a whole needs to be considered as an essential and integral part of the development of the right not to be arbitrarily displaced at the international level. IHL prohibits forced displacement and such prohibition aims to safeguard the individual right not to be displaced with its limitations. Therefore, IHL can also be further strengthened with regards to the prohibition of displacement if it is also linked to a greater degree with the right not to be arbitrarily displaced because this right can contribute to addressing certain gaps in IHL discussed so far in this chapter. Therefore, the legal grounds of the right in IHL do not mean that the right does not have its own substance and scope, as will become fully evident in Chapter 4, which deals with the capacity of the right to be a free-standing human right.

²⁹⁷ Greer, J.L (2007), 'a critique of the icrc's customary rules concerning displaced persons: general accuracy, conflation, and missed opportunity', <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/acritiqueoficrcscustomaryrulesondisplacedpersons.pdf>; p.5.

²⁹⁸ For instance, Guiding Principles is the only evidence that have been referred as an evidence for protection of IDPs. State practices or UNGA, UNSC resolutions have not been used.

3.5. Prohibition of Forced Displacement under International Criminal Law

The second key area of international law that is important for the protection of IDP rights is ICL, which is connected to the analysis above. Violations of IHL lead to the criminal responsibility of the individuals who commit or order acts that amount to an international crime, which are prohibited by international law and which entail the personal criminal liability of the individual who has committed the act. These crimes may be created by rules of customary international law or by treaties. ICL has developed as a primary means to enforce the laws of the types of armed conflict described in the previous two sections, and therefore comprises the second area of international law that is critical when identifying the legal grounds of the right not to be arbitrarily displaced in international law. It should be clarified that the legal ground on ICL does not function in the same way since ICL has a different focus; nevertheless, the connection itself of the right with ICL is critical for how the right develops at the international level.

Deportations and forcible transfers are recognised as an international crime in numerous instruments. This adds to the strength of the right not to be arbitrarily displaced. It is clearly expressed by one commentator that criminal responsibility includes an act of a state which constitutes a breach of an international obligation and this obligation is so essential for the protection of fundamental interests of international community.²⁹⁹ Moving onto that comment, it can be said that the prohibition of widespread or systematic serious human rights abuses as a result of forced displacement is so important that all states have an interest in their protection. Therefore, the breach of a state's obligation to prevent forced displacement is recognised as an international crime. Today, the crime of unlawful deportation and forcible transfers are included in the extremely important category of grave breaches.³⁰⁰ The following sections provide a detailed discussion of how ICL is also a fundamental component of international law that also needs to be assessed when examining the relevance and the applicability of the right not to be arbitrarily displaced.

²⁹⁹ Beyani, C. (1995), 'State responsibility for the prevention and resolution of forced population displacements in international law', *International Journal of Refugee Law*, Volume 7, Issue Special Issue, p.140.

³⁰⁰ Grave breaches (a notion enshrined, for instance, in Article 2 ICTY Statute), include not just willful killing, torture or inhuman treatment, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, but also unlawful deportation or transfer.

Four types of criminal responsibility on forced displacement are identified; namely, war crimes, crimes against humanity, ethnic cleansing and inhumane acts.

3.5.1. Forced Displacement as War Crimes

Forced displacement as an international crime can take different forms, such as war crimes, which are acts aiming at removing a civilian population from a certain area³⁰¹ or preventing return to abandoned property or land.³⁰² Article 85(5) of Additional Protocol I clearly states that grave breaches of the Geneva Conventions and Additional Protocol I ‘shall be regarded as war crimes’ and it includes deportation or transfer of populations as grave breaches of the Protocol.³⁰³ Grave violations of international law that are committed in war or in peacetime not only affect the victims themselves but also mankind as a whole, thus serious violations of humanitarian law contained in Additional Protocol I entails individual criminal responsibility. The crime can be committed within the territory of a single State (forcible transfer) or can be committed across borders (deportation).³⁰⁴ However, when the crime of forced displacement first emerged closely linked with the crimes of deportation following World War II, the crime of forced displacement was initially limited to international armed conflict. The treatment of forced displacement—especially internal displacement—in internal armed conflicts as a crime is the result of a long process in which the jurisprudence of international tribunals has played an essential role. For instance, while the deportation of civilians is explicitly proscribed as crimes against humanity under Article 3(d) of the ICTR Statute and Article 5(d) of the ICTY Statute, only the Statute of the ICTR recognises individual criminal responsibility for violations of Common Article 3 and Protocol II as a

³⁰¹ *Prosecutor v Krajišnik*, IT-00-39, Judgment, 27 September March 2006, para. 729.

‘Serb municipal authorities and Serb forces created severe living conditions for Muslims and Croats which aimed, and succeeded, in making it practically impossible for most of them to remain. The measures undertaken increased in severity by time, starting with dismissals from employment, house searches, and the cutting off of water, electricity, and telephone services.’

³⁰² *Prosecutor v Gotovina et al.*, IT-06-90, 15 April 2011, Trial Judgment (Volume 2 of 2), para. 2098.

‘The legal instruments further contained legal provisions, as the Trial Chamber found above, the purpose of which was to make it more difficult for people who wished to return to regain their property [...] In conclusion, the Trial Chamber finds that the legal instruments were discriminatory.’

³⁰³ see Article 85 (4)(a) of the Protocol I.

³⁰⁴ International Law Commission, Sixty-seventh session, “First report on crimes against humanity”, 17 February 2015, A/CN.4/680, paras. 27-28.

result of forced displacement³⁰⁵. Although, the Statute of ICTY does not explicitly provide for individual criminal responsibility in internal armed conflicts, the jurisprudence of the ICTY has significantly evolved in terms of recognising the prohibition of forced displacement in internal armed conflicts, hence, influenced the development of the right not to be displaced. In the *Tadić case*, it was stated that:

[C]ustomary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict.³⁰⁶

Therefore, the ICTY identified the individual criminal responsibility of those engaged in the acts of forced displacement, regardless of whether these acts are committed in internal or international armed conflicts.³⁰⁷ This view is also supported by the ICTR in its judgment on the *Semanza case* and found the Appellant individually responsible for serious violations of Common Article 3 of the Geneva Conventions and of the Additional Protocol II.³⁰⁸ Moreover, the Rome Statute of the International Criminal Court (ICC)³⁰⁹ grants jurisdiction to the Court over serious violations of Common Article 3³¹⁰ and other serious violations of the laws and customs applicable in armed conflicts not of an international character.³¹¹ Finally, ICC Statute recognises the forcible transfer of civilians in non-international armed conflicts as a war crime.³¹² It therefore can be concluded that the violation of the prohibition of forced displacement in internal armed conflicts entails individual criminal responsibility under IHL.

3.5.2. Forced Displacement as Crimes against Humanity

Another critical dimension of ICL is crimes against humanity. It has been argued that deportation had its origins as a war crime but was later extended to crimes against

³⁰⁵ ICTR Statute Article 4.

³⁰⁶ ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995; available on <http://www.un.org>, para. 134.

³⁰⁷ Also see *ibid.* para. 129.

³⁰⁸ *Prosecutor v Semanza*, ICTR-97-20, Judgment, 20 May 2005, para. 371.

³⁰⁹ Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6 (hereafter ICC Rome Statute)

³¹⁰ ICC Rome Statute Article 8(2)(c)

³¹¹ *Ibid.* Article 8(2)(e)

³¹² *Ibid.* Article 8(2)(e)(viii)

humanity so as to protect civilians of the same nationality of the perpetrator.³¹³ Some of the worst acts perpetrated had not been committed against foreign nationals but rather against the state's own citizens on racial, political or other discriminatory grounds. In fact, IDPs are faced with these situations in many cases. For instance, in the Darfur Report, the Commission found that the forced internal displacement of persons in Darfur may well amount to a crime against humanity because such displacement clearly amounted to a deliberate government policy consistently pursued by the relevant government authorities and the Janjaweed, the armed groups in Darfur.³¹⁴ The existence of criminal responsibility for crimes against humanity has significant importance for the protection of IDPs because crimes against humanity may be committed against 'any' civilians including the perpetrator's own nationals.³¹⁵ Therefore, acts of forced displacement caused by IDPs' own government members may entail individual criminal responsibility. In this issue, the *Gotovina case* has a specific importance to provide insight on the protection of IDPs in situations of forced displacement by their own government. The Trial Chamber held that crimes against humanity must be directed against any civilian population because Article 5 of the ICTY Statute applies 'any civilian population' including one within the borders of the state of the perpetrator. Hence, it rejected the argument that the victims of deportation and forcible transfer must be in the hands of a party to the conflict.³¹⁶ The Trial Chamber's reference to Article 5 has extended crimes against humanity to all victims irrespective of their nationality, and in this respect, crimes against humanity committed as a result of forced displacement by a state against its own nationals is unquestionable.

However, there are some elements which need to be fulfilled for the acts of forced displacement to constitute crimes against humanity. The ICTY has interpreted the requirement of forced displacement as crimes against humanity that it must have been committed in the context of 'widespread or systematic attack against any civilian population

³¹³ Acquaviva, G.(2011), 'Forced Displacement and International Crimes', UNHCR, *Legal and Protection Policy Research Series*, p. 18.

³¹⁴ Report of the International Commission of Inquiry on Darfur to the Secretary-General pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Geneva, 25 January 2005, para. 332. ('Darfur Report').

³¹⁵ *Prosecutor v. Kunarac et al. (IT-96-23 & 23/1)*, Trial Judgment, 22 February 2001, para.423.

³¹⁶ *Prosecutor v Gotovina et al.*, IT-06-90, Decision on several motions challenging jurisdiction, 19 March 2007,para. 56.

and the perpetrator must intent to forcibly displace civilians'.³¹⁷ Some scholars are of the view that deportation and forcible transfer as crimes against humanity appear to protect a potentially broader range of victims because it may be committed both in peacetime and in time of war³¹⁸ and it covers protection of state's citizens. These features of forced displacement as crimes against humanity can also help us to assess the applicability of IDPs' right not to be displaced. The existence of right not to be displaced can clearly be seen in the interpretation of the Trial Chamber in the *Krstić case*, as the Chamber noted that any forced displacement which involves abandoning one's home, losing property and being displaced under duress to another location amounted to an inhumane act and crime against humanity.³¹⁹ Therefore, the condition where forcible displacement amounts to a crime against humanity within or between national borders is also established³²⁰ and provides a better assessment of the right not to be displaced in the existing law.

However, the above-mentioned contextual elements (widespread and systematic) seem to be hurdles to overcome in the protection of IDPs because not all cases of forced displacement take place as widespread and systematic attacks. There are some cases that these requirements are obviously seen, such as the widespread massacres of civilians perpetuated in Rwanda or Bosnia Herzegovina, but there are some cases where the problem of displacement was by no means a new one but had been occurring for over 40 years and does not fall into the context of widespread and systematic attack (such as the case of Colombia)³²¹. This shows that even if the links between the right not to be displaced and individual criminal responsibility can be found under ICL, there is still a need to address specific situations of IDPs with the right not to be displaced as a standing right,³²² which will be discussed in detail in Chapter 4.

³¹⁷ *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 85; *Prosecutor v. Blaškić* (IT-95-14), Trial Judgement, 3 March 2000, para. 244.

³¹⁸ *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, ICL 36 (ICTY 1995), 2 October 1995 para. 141.

³¹⁹ *Prosecutor v. Krstić*, IT-98-33, Trial Judgment, 2 August 2001, para. 523.

³²⁰ *Ibid.* also see *Kupre{ki}* Judgement, para. 566.

³²¹ For a detailed info see UN Commission on Human Rights, *Addendum to the Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Profiles in Displacement: Colombia*, 3 October 1994, E/CN.4/1995/50/Add.1

³²² Jacques, M. (2012), 'Armed Conflict and Displacement', *supra* note 29, p.147.

3.5.3. Forced Displacement and Ethnic Cleansing

While, forced displacement is one of the consequences that may arise as a result of all the above discussed international crimes, it most certainly occurs as a direct result of ethnic cleansing because the main intention behind acts of ethnic cleansing is to remove persons or groups from the area. Although the expression ‘ethnic cleansing’ has not been recognized as an independent crime under IHL, it has been used in resolutions of the UNSC and the UNGA and has been acknowledged in judgments and indictments of the ICTY. The term surfaced in the context of the 1990’s conflict in the former Yugoslavia, which caused more than two million of people being IDPs in Bosnia and Herzegovina.³²³ A UN Commission of Experts defined ethnic cleansing as

‘... a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.’³²⁴

As can be understood from the definition ethnic cleansing is a discriminatory act and civilians are targeted because of their ethnic origin. This situation reveals that not only the prohibition of forced displacement is sufficient to protect displaced people, but also the prohibition of discrimination on grounds of race, ethnicity, religion or political opinion because these standards are presumed to incorporate the fundamental interest of the international community as a whole.³²⁵ This situation also explains the need for an explicit right not to be arbitrarily displaced, which prohibits the displacement when it is based on ethnic, religious, or racial grounds. The UNSC has adopted several resolutions condemning the forcible displacements of civilians and the practice of ethnic cleansing in the former Yugoslavia.³²⁶ In addition to that, the UNGA has also condemned policies of ethnic cleansing

³²³ Internal Displacement Monitoring Centre ‘Bosnia and Herzegovina Figure Analysis – Displacement Related to Conflict and Violence’ (2018), p.1 available at: <http://www.internal-displacement.org/sites/default/files/2019-05/GRID%202019%20-%20Conflict%20Figure%20Analysis%20-%20BOSNIA%20AND%20HERZEGOVINA.pdf>

³²⁴ UN Security Council, Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994, S/1994/674, available at: <https://www.refworld.org/docid/582060704.html> [accessed 13 July 2019]

³²⁵ International Court of Justice explained that some international legal obligations are so important that all States have an interest in their protection. see Case Concerning the Barcelona Traction, Light And Power Company, Limited, International Court Of Justice Reports Of Judgments, Advisory Opinions And Orders (1970).

³²⁶ For instance, S/RES/752(15 May 1992), S/RES/819 (16 April 1993), S/RES/1019 (9 November 1995).

on different occasions.³²⁷ In its Resolution on the 'Situation of human rights in the Republic of Bosnia and Herzegovina', the UNGA recognised the policy of ethnic cleansing of displaced people as the violation of human rights and humanitarian law and expressed that these violations limit the right to freedom of movement of displaced people.³²⁸ In addition to that, the ICTY referred to the expression of 'ethnic cleansing' in its judgments. The Trial Chamber found the evidence of ethnic cleansing had taken place in the area indicated in the *Kordic case*.³²⁹ The evidence was that the Muslim population of these villages was either killed or expelled, and their houses had been burned.³³⁰ There is no doubt that internal displacement still complicates the search for a lasting solution in the aftermath of the conflict.³³¹ The problem of IDPs and refugees was so big, that the Annex 7 of the Dayton Peace Agreement was designed to address the displacement of IDPs and refugees, and their return to their homes of origin.³³² It must be noted that in the cases of forced displacement, the ethnic cleansing was not a by-product of the criminal activity or conflict, it was a deliberate policy.³³³ As the acts of ethnic cleansing create large numbers of IDPs, it is important to establish criminal responsibility in on where ethnically-directed violence took place. These conditions can still be found today in situations where IDPs have been affected by ethnically driven violence, therefore highlighting the strong interconnection that needs to be accounted for when examining the links between ICL and the right not to be arbitrarily displaced.

³²⁷ For instance, UN General Assembly, A/RES/49/196 (10 March 1995). UN General Assembly, A/RES/49/10 (8 November 1994).

³²⁸ UN General Assembly, A/RES/49/196 (10 March 1995), para.18.

³²⁹ *Prosecutor v. Dario Kordic*, IT-95-14/2-A, Appeal Judgement, 17 December 2004. For a list of ethnic cleansing case law see <https://www.refworld.org/topic,50ffbce5160,50ffbce5172,0,ICTY,.html>

³³⁰ *Ibid.* para.535.

³³¹ This is not only the case for Bosnian IDPs but to Georgian IDPs as well. One study highlights Georgian IDPs still wait for a lasting solution after Georgian-Abkhaz conflict which was included the elements of ethnic cleansing. For further discussion see Dale, C. (1997) 'The Dynamics and Challenges of Ethnic Cleansing: The Georgia-Abkhazia Case, available at: <https://www.refworld.org/docid/3ae6a6c54.html>

³³² Annex 7 on 'Agreement on Refugees and Displaced Persons' established that: 'All refugees and displaced persons have the right freely to return to their homes of origin [...] to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.'

³³³ For further info for the deliberate policies of ethnic cleansing see *Prosecutor v. Radoslav Brdjanin*, IT-99-36-T, Trial Judgement, 1 September 1994, para. 118.

3.5.4. Forced Displacement Amounts to Other Inhumane Acts

The category of 'other inhumane acts' is not an independent category of crime and its dependency on other crimes considered crimes against humanity is essential for its legitimacy. Nonetheless, other inhumane acts are important for identifying the legal grounds of the right not to be arbitrarily displaced in ICL. The term 'other inhumane acts' has been included in the first definition of crimes against humanity which was provided by the International Military Tribunal in Nuremberg in 1945, which defined crimes against humanity in Article 6(c) as referring to '[m]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population...'.³³⁴ Since then, the term 'other inhumane acts' has been used in different legal instruments dealing with the definition of the crimes against humanity. By the Rome Statute and the establishment of the ICC, other inhumane acts have come to encompass a wide array of acts. Common to all definitions of crimes against humanity is that the inclusion of 'other inhumane acts' as the last category on the list of acts that are considered as crimes against humanity. This is needed to make sure any crime of sufficient gravity and fulfilling the other conditions of a crime against humanity would not go unpunished for mere lack of imagination of the drafters. Some legal instruments provide broader interpretation of other inhumane acts including acts which severely damage physical or mental integrity and health or human dignity. For instance, The ILC adopted a definition of crimes against humanity in 1996, as '[a]ny of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:[..] (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm'.³³⁵ Also, Article 7(1) of the 1998 Rome Statute defines crimes against humanity as 'any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:[..] (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.³³⁶ The definition

³³⁴ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279, 287-88.

³³⁵ International Law Commission Report on the work of its Forty-Eighth Session, art. 18, U.N. Doc. A/CN.4/L.532 (1996)

³³⁶ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

provided by the ICTY and ICTR to such a term was also broad, understanding serious attacks on human dignity, as well as acts causing serious suffering or injury, to amount to crimes against humanity. ICTY confirmed that 'other inhuman treatment is an intentional act or omission that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.'³³⁷ Inclusion of both physical and mental suffering as an 'other inhumane act' is also confirmed by the ICTR and is defined as an 'intentional act or omission committed against a protected person, causing serious mental harm, physical suffering, injury or constitutes a serious attack on human dignity'.³³⁸

With this broader interpretation, the International Tribunals have developed jurisprudence in relation to forcible transfers of civilians as 'other inhumane acts'. As discussed in the previous sections, forcible transfers of civilians take place within national borders and therefore create IDPs. In this sense, cases concerning the forcible transfers are closely related to IDP protection. Case law provides that forcible transfer of people could constitute an 'other inhumane act' as a crime against humanity and therefore the acts of forcible transfer violate the rights of displaced people and requires their protection. In the *Krstić case*, the ICTY Trial Chamber gives a clear legal reasoning on why forcible transfer of civilians amounted to other inhumane acts. The Court held that any forced displacement is a traumatic experience that involves abandoning one's home, losing property and being displaced under duress to another location, and amounts to other inhumane acts and crime against humanity.³³⁹ Thus, the qualification of an act of forcible transfer of civilians as other inhumane act has been established because it causes serious mental harm, physical suffering, injury or constitutes a serious attack on human dignity. 'Other inhuman acts' are further assessed by the ICTY pursuant to Article 5(i)³⁴⁰ of the ICTY Statute and 'other inhumane act' undoubtedly embraces the forcible transfer of groups of civilians. Trial Chamber stated that '[t]he civilians assembled at Potočari and transported to Kladanj were

³³⁷ ICTY, Prosecutor v. *Delalić et al.*, "Judgement", IT-96-21-T, 16 November 1998, para. 543.

³³⁸ ICTR, Prosecutor v. *Kayishema and Ruzidana*, "Judgement", ICTR-95-1-T, 21 May 1999, para. 151.

³³⁹ *Prosecutor v. Krstić*, IT-98-33, Trial Judgment, 2 August 2001, para. 523.

³⁴⁰ Article 5 of the ICTY Statute stated that '[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.'

not subjected to deportation but rather to forcible transfer. This forcible transfer, in the circumstances of this case, still constitutes a form of inhumane treatment covered under Article 5'.³⁴¹ This decision reveals the fact of the transfer took place within the borders of Bosnia-Herzegovina and establishes the crime against humanity of 'other inhumane acts'. Potočari and Kladanj are towns in Bosnia and Herzegovina and civilians who were forcibly transported from Potočari to Kladanj had become IDPs. The Trial Chamber found the accused guilty of persecutions committed, *inter alia*, through the inhumane act of forcible transfer of IDPs.³⁴² In the *Prlić case*, Trial Chamber further clarified the meaning of the other inhumane acts that is included in the definition of crimes against humanity with other types of crimes under Article 5 and provided a clear linkage between forcible transfers of IDPs and other inhumane acts. Trial Chamber stated that other inhumane acts cover a set of criminal activities not explicitly enumerated under Article 5. Thus, the case-law has held that the acts of forcible transfers, among others, fall into the category of other inhumane acts.³⁴³ The same approach has been taken by the Trial Chamber in the *Kupreškić case* and forcible displacement within national borders is included as an inhumane act under Article 5(i) defining crimes against humanity.³⁴⁴ Case law reveals that other inhumane acts provides basis for a potentially broad understanding of the acts of forcible transfer that constitute crimes against humanity.

The subject of protection of civilians who become IDPs as a result of forcible transfers during conflict situations also led the ICTY raised the question on how serious are these acts of forcible transfers specifically to other enumerated crimes against humanity such as torture and deportation under Article 5 of the Statute.³⁴⁵ The Trial Chamber acknowledged that the acts of forcible transfer, specifically the displacement of persons within Bosnia and Herzegovina, are of a similar seriousness to other enumerated crimes against humanity. The acts of forcible transfer were of similar seriousness to the instances of deportation, as they involved a forced departure from the residence and the community, without guarantees concerning the possibility to return in the future, with the victims of such forced transfers

³⁴¹ ICTY, *Prosecutor v. Krstić*, "Judgement", IT-98-33-T, 2 August 2001, para. 532.

³⁴² *Ibid.*

³⁴³ *Prosecutor v. Jadranko Prlić*, Case No. IT-04-74-T, Judgement (TC), 29 May 2013, paras. 79-80.

³⁴⁴ *Prosecutor v. Kupreškić et al. (IT-95-16)*, Trial Judgment, 14 January 2000, para.566.

³⁴⁵ See *Prosecutor v. Krajišnik*, IT-00-39-A, Appeal Judgement - 17.03.2009, para.388.

invariably suffering serious mental harm.³⁴⁶ While acknowledging forcible transfer has similar seriousness to the other classes of crimes provided for in the other provisions of Article 5, the Trial Chamber have also made reference to international human rights instruments on deciding the parameters for the interpretation of 'other inhumane acts'.³⁴⁷ The referred international human rights instruments -the Universal Declaration of Human Rights and the ICCPR- provides the right to freedom from torture and inhuman or degrading treatment. Indeed, human rights treaties prohibit torture or cruel, inhuman or degrading treatment. Therefore, in order to understand the context of inhuman treatment under IHL it is important to assess how torture is defined because the definition of torture contains the meaning of inhuman treatment. For instance, the UN Convention against Torture (UNCAT)³⁴⁸ defines torture as 'an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. Therefore, Human Rights Courts focused on the severity of the acts to decide what amounts to torture or inhuman treatment. As Rodley points out the degree of suffering is the main difference between torture and inhuman treatment, but torture also has to be deliberate, for example, to extract information or to intimidate.³⁴⁹ Article 16 of the UNCAT further refers explicitly to 'cruel, inhuman and degrading treatment or punishment not amounting to torture', providing for a number of the Convention articles to be applicable, not only to torture, but to such other ill-treatment. Rodley argues that case law has influenced the content of definitions of torture and inhumane acts. However, the link between inhumane acts and forcible transfers is not provided by the Human Rights Courts. They rather provided a criterion to decide what amounts to an inhumane act by assessing the severity of the pain or suffering. For instance, both the Human Rights Committee and the ECtHR included the element of 'severe mental pain or suffering' in the definition of inhuman treatment in their decisions.³⁵⁰ According to their decisions, lack of adequate food, water or medical treatment adversely affect mental

³⁴⁶ Ibid.

³⁴⁷ *Prosecutor v. Kupreškić et al. (IT-95-16)*, Trial Judgment, 14 January 2000, para.566.

³⁴⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, Annex, 10 December 1984.

³⁴⁹ Rodley, N. (2002), 'The Definition(s) of Torture in International Law', *Current Legal Problems*, Volume 55, Issue 1, p.481.

³⁵⁰ UN Human Rights Committee, *Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, 8 July 1994, para. 6.4; UN Human Rights Committee, *Williams v. Jamaica*, Communication No. 609/1995, para. 6.5; European Court of Human Rights, *Keenan v. United Kingdom*, Judgment, 3 April 2001, para.115.

condition of people and therefore such circumstances amount to inhuman treatment.³⁵¹ This broad interpretation of inhuman treatment allow us to reconsider the cases of forced displacement in which the plight of displaced people highly likely to led the mental suffering of those can also be assessed as an inhumane act under IHRL. In most of the cases of forced displacement family separation, and difficulties to access food, shelter and/or health services, makes IDPs especially vulnerable to acts of violence such as attacks on camps, disappearances or rape.³⁵² The seriousness and intensity of the act of forced displacement might led them to suffer from some form of psychological disorder, including anxiety attacks, sleeplessness, nightmares, depression or other nervous conditions. However, the qualification of an act of forcible transfer as an inhuman act yet to be established by the Human Rights Courts because the consequences of the act of forcible transfer are varied and need to be assessed on a case-by-case basis with due regard for the individual circumstances. In fact, case law has influenced the content of definitions which, in turn, have influenced later case law. For instance, there are cases in which includes the acts of sustained beatings which would previously have categorized as inhuman and degrading treatment, was now to be considered as torture.³⁵³

As said earlier 'other inhumane acts' exist already in the Nuremberg Statute as well as the statutes of the ICTY and the ICTR but it is more specifically defined for the first time in the Rome Statute as "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The clause gives great discretion to the criminal courts to define the actual conduct amounting to an 'other inhumane act'. Indeed, Criminal Tribunals have developed jurisprudence in relation to forcible transfers of IDPs as 'other inhumane acts' with this broader interpretation. In the early days of the ICTY and the ICTR, they made more references to external sources in interpreting definitions of crime, but later as the body of case law has grown significantly, international criminal courts refer more to their own and each other's case law. The fact that forcible transfers of IDPs or any other civilian amount to 'other inhumane acts' are a

³⁵¹ Ibid.

³⁵² Cohen, R., & Deng, F. M. (1998). Masses in flight, *supra* note 32, p. 74.

³⁵³ Rodley, N. (2002), 'The Definition(s) of Torture in International Law', *Current Legal Problems*, *supra* note 349, p.477.

constant in the international criminal law statutes, but the scope of it is strictly dependent on the respective articles on crimes against humanity as a whole, which has differed considerably over the years and from court to court.

Overall, individual criminal responsibility for acts of forcible displacement can take many forms under ICL, such as ‘war crimes’, ‘crimes against humanity’, ‘ethnic cleansing’ and ‘other inhumane act’. However, the values protected by these crimes are the same, namely the “right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location”.³⁵⁴ It can be concluded that the right not to be arbitrarily displaced has strong legal grounds in ICL which can be mostly found in decisions of international criminal tribunals on forced internal displacement. Having clarified the connection of the right with this second major regime of international law, the discussion will now move to the connection of the right with the third major regime, which is IHRL.

3.6. The Prohibition of Forced Displacement under International Human Rights Law

As in the case of IHL and ICL, the regime of IHRL also has its own significance in identifying the legal foundations of the right not to be arbitrarily displaced in international law. As noted above, such legal foundations are distinct to IHRL and do not necessarily reflect the same functions as the legal foundations of the right not to be arbitrarily displaced in IHL and ICL. There are certain overlaps as IHL and IHRL supplement and support each other and allow for identifying and analysing human rights standards guaranteeing legal protection against displacement. ICL and IHRL are also connected as the former’s focus on individual criminal responsibility for the acts of forced displacement as a result of violation of IHL, also demonstrated that there are certain human rights violations that fall under the remit of IHRL, which covers the protection of human rights in armed conflict situations.

The legal foundation for the right not to be displaced can be found in certain provisions of IHRL and prohibition from displacement is only implicit in these provisions, in particular those pertaining to freedom of movement and choice of residence, freedom from arbitrary

³⁵⁴ *Prosecutor v. Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para.69.

interference with one's home, and the right to housing.³⁵⁵ The key norm lies under Article 12 (1) of the ICCPR guarantees everyone not just freedom from movement but also the right to choose one's residence, which includes the right to remain in the place of one's choice and not be displaced.³⁵⁶ The freedom of movement and residence is acknowledged by the Human Rights Council as fundamental human right which was an essential part of the right to personal liberty.³⁵⁷ With regard to protection from displacement, the Human Rights Committee (HRC), the ICCPR's monitoring body, interpreted the right to reside in a place of one's choice within the territory as inclusive of protection against all forms of forced internal displacement.³⁵⁸ Although, the HRC does not provide detailed information on what constitutes 'all forms of forced internal displacement', it is assumed that preventing the entry or stay of persons in a defined part of the territory can be considered as the main forms of forced displacement because of the involuntary nature of the movement. The right of a person to enter his or her own country recognizes the special relationship of a person to that country and it implies the right to remain in one's own country.³⁵⁹ Thus, the issue of protecting IDPs from the forced displacement is of particular relevance in the context of the Article 12 (1) ICCPR which only provides protection against displacement within the national borders of a country. The UNGA has reaffirmed the link between freedom of movement and residence and the protection from internal displacement, and has stated that 'all persons, including those internally displaced, have the right to freedom of movement and residence and should be protected against being arbitrarily displaced.'³⁶⁰ Moreover, the close connection between the right not to be displaced and the respect of freedom of movement is recognised by the African Commission on Human and Peoples' Rights (ACmHPR) in the *COHRE case*, where it stated that the right to protection from displacement is derived from

³⁵⁵ Kälin, W. (2008). 'Annotations', *supra* note 134, p.27.

³⁵⁶ Article 12 (1) of the ICCPR: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'

³⁵⁷ Human Rights Council (formerly named as the UN Commission on Human Rights) is rejected the idea that 'Freedom of movement' was not a fundamental, but rather a secondary right. The UN Commission on Human Rights, UN Doc. A/2929, Ch. VI., para.52.

³⁵⁸ UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, hereafter 'General Comment 27', available at: <https://www.refworld.org/docid/45139c394.html> [accessed 01 June 2019], para.7.

³⁵⁹ Joseph, S. Schultz, J., Castan, M. (2000), 'The International Covenant on Civil and Political Rights: Cases, Materials and Commentary', *Oxford University Press*, p.259; Nowak, M. (2005), 'U.N. Covenant on Civil and Political Rights: CCPR Commentary', 2nd ed., N.P. *Engel Publisher*, p.266.

³⁶⁰ UNGA Res.64/12 (2009), 'Protection of and Assistance to Internally Displaced Persons', preamble.

the right to freedom of movement and choice of residence contemplated in the African Charter and other international instruments.³⁶¹

In addition to the Article 12 of the ICCPR, the right not to be displaced can be said to be implicitly guaranteed by the three regional human rights conventions. The right to freedom of movement and residence is laid down in Article 2(1) of Protocol No.4 to the European Convention on Human Rights (ECHR), Article 22(1) of the American Convention on Human Rights (ACHR), and Article 12(1) of the African Charter on Human and Peoples' Rights (African Charter)³⁶², all of which stipulate that 'every individual lawfully in the territory of a State has the liberty of movement - right to move about in it, right to freedom of movement - and freedom to choose his/her residence.' In this context, internal displacement is considered as a human rights issue and it is not only a violation of the right to freedom of movement but also the right to family life, the right to personal security, the right to property and the rights to food and water.³⁶³ Clearly, the right has various facets and prevention of displacement is inherent in respect of other human rights.

However, all aforementioned Articles contain derogation clauses that permit states to suspend certain guarantees provided with the right to freedom of movement and this is considered as a limitation in the area of IDP protection.³⁶⁴ The restrictive measures can be found in Article 12 (3) of the ICCPR, which states that the rights set forth in paragraphs 1 and 2:

'[s]hall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'

According to the relevant paragraph, exceptional circumstances exist in two conditions. First, the restriction must be provided by the law. In adopting laws providing for restrictions

³⁶¹ *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication No. 279/03–296/05 (27 May 2009), para.189.

³⁶² Kälin, W. (2008). 'Annotations', *supra* note 134, p.27. also see Article 13 of the Universal Declaration of Human Rights.

³⁶³ On the list of full human rights violations of IDPs as a result of displacement see Kälin, W. *et al* (2010), 'Incorporating the guiding principles on internal displacement into domestic law: issues and challenges', *Studies in Transnational Legal Policy No. 41*, The American Society of International Law.

³⁶⁴ Cohen, R., & Deng, F. M. (1998). *Masses in flight*, *supra* note 32, p.79.

permitted by Article 12(3), states should do so with respect for the essence of the rights.³⁶⁵ Secondly, the restrictions provided by law are only permissible if they aim to protect national security and public order. Therefore, the interpretation of this paragraph can be made as follows: the inclusion of the conditions for restrictions does not mean that the decision is left to the discretion of the parties.³⁶⁶ Additionally, it is also argued that the restriction must be proportionate to the interest that is to be protected.³⁶⁷ In considering the scope of the acts in situations of public emergency, Article 4(2) of the ICCPR lists a number of rights from which no derogation can be made such as right to life, the protection from inhuman or degrading treatment, and the right to freedom of thought, while the freedom of movement is not included in this list. However, in relation to derogations in times of public emergency, the HRC points out that acts amounting to crimes against humanity cannot provide justification for derogations that are not listed in Article 4(2). As pointed out in its General Comment 29, 'deportation' or 'forcible transfer' of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity.³⁶⁸ Thus the legitimate right to derogate from Article 12 of the ICCPR during a state of emergency can never be accepted as justifying such measures.³⁶⁹ Accordingly, a state party may not derogate its obligations under Article 12 of the ICCPR safeguarding freedom of movement if the restrictions imposed are the result of the commission of a crime against humanity. Because of the important community values implicated in protecting human rights, the restriction cannot be permissible if the action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action. This also means that restrictions of the right to freedom of movement have to be consistent with other rights stipulated in the ICCPR such as prohibition of discrimination.

³⁶⁵ See Article 5(1) ICCPR: 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

³⁶⁶ HRC General Comment 27, *supra* note 358, para.13.

³⁶⁷ Morel M. (2014), 'The Right not to be Displaced in International Law', *supra* note 28, p.106. Also see HRC General Comment 27, *supra* note 358, paras.14-15.

³⁶⁸ UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <https://www.refworld.org/docid/453883fd1f.html> [accessed 04 June 2019], para. 12.

³⁶⁹ *Ibid.*, para. 13(d).

It can also be inferred that if the acts of forced displacement amount to crimes against humanity³⁷⁰ this cannot provide justification for the restriction of freedom of movement. Thus, there is a close connection between certain human rights violations as crimes against humanity and the scope of legitimate derogation from the ICCPR. In this sense, the applicability of this exception requires close scrutiny.

Moreover, freedom of movement and residence can be restricted with two additional restriction grounds namely public safety in Article 22(3) of the ACHR and crime prevention in Article 2(3) of Protocol No.4 to the ECHR. Some commentators follow different interpretations of explaining the restriction grounds on these conventions. Some are of the view that these given additional restrictions in the ECHR and ACHR offer a less broad protection than the ICCPR as they include additional restriction grounds; namely, that of 'public safety' and that of 'prevention of crime'³⁷¹. Others argue that 'public safety' and the 'prevention of crime' can be interpreted as being implied in the concept of 'public order' as formulated in Article 12(3) of the ICCPR, which means no additional restriction can be found.³⁷² Even though it seems that the above mentioned regional human rights instruments include additional restrictions, they do not represent a difference in substance.³⁷³ This view seems reasonable because what is important here is considering the application of the most protective provisions for individuals rather than considering the additional possibility of restricting the right to freedom of movement. Otherwise, a state's claim to the existence of public emergency would be aiming to justify the denial of human rights violations.

In considering the right to freedom of movement and residence, the practices of human rights bodies provide insight into the assessment of the extent to which the protection from internal displacement stems from the freedom of movement and residence. As can be seen from the IHL case law overview above, plenty of examples of the violations of the act of forced displacement can be found under the decisions of the ICTY and the ICC. However, regional human rights bodies offer a narrow scope of forced displacement cases compared

³⁷⁰ Forced displacement amount to international crimes on discriminatory grounds is discussed in the previous Section, above.

³⁷¹ Morel M. (2014), 'The Right not to be Displaced in International Law', *supra* note 28, p.113.

³⁷² Nowak, M. (2005), 'U.N. Covenant on Civil and Political Rights: CCPR Commentary', *supra* note 359, p. 77.

³⁷³ Report of the Committee of Experts to the Committee of Ministers of the Council Europe (1970) , Doc. H(70),7, p. 33.

with the decisions of International Criminal Tribunals. To put it differently, explicit mention of protection from displacement in IHL would help us to clearly address the human rights of victims as a result of displacement. It is assumed that the implicit character of the protection against displacement guaranteed under the right of the freedom of movement and residence might limit the broad assessment of this right. For instance, in the cases where the breach of freedom of movement was found by the HRC and ECtHR³⁷⁴, both authorities actually dealt with the question of being prohibited from returning to the country rather than being forced to leave the country. In other words, the authorities did not consider the alleged violation of the right not to be displaced in relation to the author's forced movement from their place. Besides the prohibition from returning to his/her country, the right to freedom of movement was already violated because these victims had been forcibly displaced in the first place. Despite having considered the displacement itself as a human rights violation, addressing the root causes of displacement and considering the human rights violations of pre-displacement phase is lacking in the judgments of international courts. Nonetheless, at the regional level there are three cases that are of particular relevance to forced internal displacement.

In the case of *Moiwana Community v. Suriname*,³⁷⁵ the Moiwana villagers were displaced as a result of the governmental military operation conducted in 1986. This military operation had resulted in the death of at least 39 defenceless community members and many of the rest had been forced to flee because their houses had been burned and destroyed. For this reason, the Inter-American Court of Human Rights (IACrHR) judged that Suriname was in breach of Article 22 (freedom of movement) along with several human rights enshrined in the ACHR. A closer look into the Court's legal reasoning concerning the freedom of movement reveals the link between the protection against displacement and the freedom of movement. The first element can be found in the Court's reference to the HRC General Comment 27, which includes the interpretation of freedom of movement as guaranteeing protection from internal displacement.³⁷⁶ The second element is the Court's reference to the Guiding Principles on Internal Displacement, stating that 'these guidelines illuminate the

³⁷⁴ see HRC, *Maral Yklymova v. Turkmenistan*, Communication No. 1460/2006(2009); ECtHR, *Denizci and Others v. Cyprus*, Application Nos. 25316/94, 25317/94, 25318/94, 25319/94, 25320/94 and 27207/95 (2001).

³⁷⁵ Inter-American Court of Human Rights (IACrHR), *Moiwana Community v. Suriname*, Ser. C No.124 (2005).

³⁷⁶ *Ibid.*, para. 110.

reach and content of Article 22 of the ACHR in the context of forced displacement'.³⁷⁷ The Court included Principle 9 which provides that:

'States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.'

However, it is unfortunate that the Court did not include Principle 6³⁷⁸ which is the key principle in the protection against forced internal displacement and recognises the right not to be internally displaced. It is understood from the Courts' legal reasoning that since it made reference to the indigenous people's right not to be displaced with Principle 9, it ignored to include Principle 6. The Court nonetheless acknowledged the link between the right to freedom of movement and residence, and protection against internal displacement in the context of state responsibility.

Another indication of IACrTHR's recognition of the link between the right to freedom of movement and residence, and protection against internal displacement can be found in the *Mapiripán Massacre v. Colombia*³⁷⁹ case. The Mapiripán population were forced to flee by the members of the paramilitary group called Colombian Units of Self-Defence. The Court's legal reasoning of the violation of Article 22 of the ACHR is similar to the *Moiwana Community* case by emphasising the importance of the freedom of movement with reference to HRC's General Comment 27.³⁸⁰ The Court then made reference to the Guiding Principles on Internal Displacement by stating the importance of the Principles in defining the content and scope of Article 22³⁸¹, without making specific reference to the principles regulating IDPs' movement-related needs as it did in the case of the *Moiwana Community*. Apart from that, in the following paragraphs, the Court provides particular examination of internal displacement of the victims of the Mapiripán massacre. At this point, it is important to mention that when the application was submitted to the IACrTHR, the Inter-American Commission did not allege violation of Article 22(1) of the American Convention in the

³⁷⁷ Ibid. para. 111.

³⁷⁸ Principle 6 of the Guiding Principles on Internal Displacement states that: 'Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.'

³⁷⁹ IACrTHR, *Mapiripán Massacre v. Colombia*, Ser. C No. 134(2005).

³⁸⁰ Ibid. paras. 301-304.

³⁸¹ Ibid. para.171.

application. In other words, the Court itself made link between Article 22 and prohibition of forced internal displacement by widely analysing the phenomenon of internal displacement. It noted that forced internal displacement of the victims cannot be separated from the other violations found in the instant Judgment, such as the right to humane treatment and the right to property, because of the broad range of human rights affected or endangered by the violation of the right to freedom of movement. Therefore, states must provide protection in the framework of Article 22 of the Convention.³⁸² The main legal reasoning for the inclusion of the right to freedom of movement is the Court's 'living instrument' approach to human rights treaties, which means that human rights treaties require non-restrictive interpretation and must be interpreted in accordance with current and on-going conditions.³⁸³ In addition, the Court's took this 'living instrument' approach one step further and made its major contribution to the IDP's right not to be displaced with a wider interpretation of Article 22, by recognising explicitly the right to not be forcefully displaced within a State Party to the Convention.³⁸⁴ This is the first time that the implicit right not to be internally displaced under IHRL was made explicit in one of the Court's decision since the launch of the Guiding Principles. As the right not to be arbitrarily displaced deals with the pre-displacement phase, it is assumed from the Court's judgment that addressing the root causes of internal displacement cannot be ignored while interpreting the application of the right to freedom of movement.

A third relevant case is from the ACmHPR in the previously mentioned *COHRE case*. As a result of alleged gross and systematic violations of human rights by the Republic of Sudan against the indigenous black African tribes in Darfur, hundreds of people were forcibly displaced. Thus, the violation of the right to freedom was considered to have been breached among other violations of human rights. In addition to the ACmHPR's recognition of the link between freedom of movement and residence and the protection from internal displacement, while considering the alleged violation of Article 12 (1) (the right to freedom of movement and residence), it made specific reference to Principle 5 of the Guiding Principles³⁸⁵, which requires States to adhere to international law so as to prevent and/or

³⁸² Ibid. paras. 164-186.

³⁸³ Ibid. para. 187.

³⁸⁴ Ibid. para. 188.

³⁸⁵ *COHRE case*, supra note 274, para. 188.

avoid situations that might lead to displacement. In the following paragraphs, the Commission took the evolving interpretation as IACrTHR did, and explicitly recognised the right to protection from the right to protection from internal displacement, which has an impact on the enjoyment of freedom of movement and residence.³⁸⁶

Both the IACrTHR and the ACmHPR have developed general practice to consider the right not to be displaced while dealing with cases of displacement in the context of freedom of movement, while ECtHR seems to focus on the right to property or the right to private life. However, still the limited number of case laws offer a limited legal reasoning while analysing how IDPs can be protected from forced displacement under human rights law and to what extent this legal protection amounts to IDPs' right not to be displaced.

Overall, the right not to be arbitrarily displaced has legal foundations in IHRL, which can be identified in provisions regarding the right to freedom of movement. The discussion above showed that when assessing the content of Principle 6 we can see that there is a mostly implicit connection with the right to freedom of movement, which is evident in human rights courts' decisions. The right to freedom of movement helps us understand how forced displacement is interpreted by courts under IHRL, and how such interpretation can allow us to see whether Principle 6 is included while assessing freedom of movement. Even if Principle 6 is now always included in an interpretation, it can be understood as increasingly becoming an integral part of the initial assessment. Such implicit connection constitutes the legal foundation of the right not to be arbitrarily displaced in IHRL.

3.7. CONCLUSION

This chapter has demonstrated that the development of the right not to be arbitrarily displaced has legal foundations in three major regimes of international law, namely IHL, ICL and IHRL. The discussion showed that each of these legal foundations can function in a distinct way, but they are all significant when assessing how the right and its development can be understood in the context of international law. Therefore, the recognition and applicability of the right can be further strengthened if we highlight the connections of the

³⁸⁶ Ibid. paras 188-189.

right with IHL, ICL and IHRL. Conversely, the relevance of certain key provisions in these three regimes can be enhanced when we see how they can apply to cases of prevention of forced displacement when these provisions are re-interpreted through the content of Principle 6.

Under IHL, the prohibition of forced displacement is established in both in international armed conflict and non-international armed conflict. Under ICL, individual criminal responsibility for the acts of forced displacement can take many forms such as war crimes, crimes against humanity, ethnic cleansing or other inhumane acts. Based on the case law overview provided above, the elements of forced displacement include direct or indirect means of coercion and involuntary movement, which can take place either within the territory of a single state (forcible transfer) or across the state borders (deportation).

While Article 49(1) of the Fourth Geneva Convention provides an absolute prohibition of any kind of forced displacement (either deportation or forcible transfer), Article 17 of the Additional Protocol II includes exceptions of the act of displacement, namely, the security of the civilians and imperative military reasons. The second paragraph of Article 49 also includes similar grounds that can be permissible with regards to evacuation. Most of the conclusions reached with regards to evacuations, such as a temporary measure necessary to protect the population from the conflict and a legitimate military or security reason, are also applicable to the prohibition of displacement in internal armed conflicts.

In the cases of forced displacement, the convergence of IHL and IHRL provisions providing the prohibition of forced displacement of civilians is the approach supported by this thesis as they complement each other in situations of war and in peacetime, or in cases of derogations. Protocol II contains a basic core of human rights and is reinforced by provisions inspired by human rights documents. In other words, forced displacement does not only constitute a violation of IHL, but it is a human rights issue in the first place. As these two bodies of international law are related, their interrelation is used for the purpose of providing an optimal protection of civilians, including IDPs. However, even though the better protection from forced displacement of civilians can be provided by this complementary approach, there are still some grey areas that need to be filled for the

increased protection of IDPs from forced displacement as they face some challenges only specific to their situations.

Despite the relatively extensive jurisprudence of International Criminal Courts regarding IHL rules, the weaker emphasis on addressing the root causes of displacement, rather than solutions following the uprooting of individuals, is a very problematic gap for IDPs' protection from forced displacement. In addition to that, as the only Article that provides the absolute prohibition of displacement, Article 49 is not applicable to states' own nationals. This is a challenge for IDP protection as state's themselves are being the perpetrators of their nationals in most of the cases. Even though the existence of criminal responsibility for crimes against humanity for the acts of forced displacement by a state against its own nationals has been proved by ICTY jurisprudence, the condition to meet the contextual elements (widespread and systematic attack) of this category of crime clearly weakens the IDPs' protection from forced displacement.

It is also important to note that the ICTY has developed jurisprudence in relation to forcible transfers of civilians as 'other inhumane acts', which included the forcible transfer of group of civilians. Among each category of crime, forcible transfer amounted to 'other inhumane acts' and appeared to protect a potentially broader range of acts of forced displacement as both the elements of physical and mental suffering were included, while it also covered the protection of state's citizens. However, even though the linkage between displacement and the concept of 'inhumane treatment' has been established under IHL, Human Rights Courts do not provide a specific example of forced displacement that amounts to inhuman treatment. In fact, when we look at the movement related rights under the human rights system, both the HRC and the regional human rights courts have decided relatively few cases on the violation of freedom of movement within the borders of a state. Even if the prohibition of forced displacement has been established both under the IHL and the IHRL, addressing the root causes of displacement and considering the human rights violations of pre-displacement phase is lacking in the judgments of courts.

Hence, all these reasons highlight the need for an evaluation of an explicit mention to the right not to be displaced within the context of IDP protection that is applicable both in situations of armed conflicts and in peacetime, and protecting state's own citizens from

displacement by addressing the root causes of displacement. The right not to be arbitrarily displaced is highly relevant to IHL, ICL and IHRL, and their specific articles related to forced displacement, as has been examined in detail in this chapter, while this right can also serve to address gaps in international law. The chapter overall shows that the development of the right not to be arbitrarily displaced needs to be assessed in relation to IHL, ICL and IHRL, and such an assessment is important for how we understand how the right not to be arbitrarily displaced has developed in terms of both national and international law.

In order to optimise the effectiveness of this right, it is possible to re-interpret and re-assess key articles and provisions in international law, and re-think how these can be mobilised to contribute to the protection of IDPs. The right not to be arbitrarily displaced offers a significant window that allows for encompassing key aspects of IHL, ICL and IHRL, and bringing such aspects to the centre of attempts towards greater and more effective protection of IDPs. In order to see how such development has become possible, it is necessary to examine not only the legal foundations of the right but also its own content as a free-standing human right, which will be the focus of Chapter 4. Such discussion will complete the examination of how the right has evolved at the level of international law, but will also identify the possibility that the development of the right can also be driven by innovations in national law. The national level will be the focus of Chapter 5, and there it will become evident that the international developments in terms of the legal foundations of the right and its status as a free-standing human right also need to be complemented by an analysis of a number of additional developments in countries that recognise the right not to be arbitrarily displaced in their national frameworks. The thesis therefore remains open to the possibility that the gradual development of the right not to be arbitrarily displaced may actually be driven by a critical mass of countries that explicitly endorse this right, even though, as has been shown so far, the right was initially defined and developed at the level of international law.

CHAPTER 4: THE RIGHT NOT TO BE ARBITRARILY DISPLACED

4.1. Introduction

The discussion above showed that the right not to be arbitrarily displaced has a legal ground on international law. However, not all human rights that are derived from international law are categorised as free-standing human rights. To understand if the right not to be arbitrarily displaced has reached such status, this chapter will examine some of the eligibility criteria required for a human right to be considered as a free-standing one, and then apply these criteria to this specific right. Once a right reaches that status it becomes a concern of both international and national law. It is important to note that the process of attaining this status can be driven by the international or the national law level. In the former case, it is possible that certain rights are established as free-standing rights by major international treaties and binding decisions by international organisations, i.e. UNSC resolutions. These rights are then adopted by an increasing number of states. In the latter case, it is possible that a number of states will establish a right at the national level and then promote its implementations through more advanced framework. When a critical number of states engage in such process, then they contribute to promoting the internationalisation of this right.

The following sections therefore focus on examining what criteria the right not to be arbitrarily displaced needs to meet in order to reach the status of a free-standing human right. The discussion first analyses developments leading to explicit recognition of the right not to be arbitrarily displaced, then examines the rights-based approach to internal displacement, and then focuses on the right not to be arbitrarily displaced as a free-standing right, with five eligibility criteria discussed in detail.

4.2. Developments Leading to Explicit Recognition of the Right Not to be Arbitrarily Displaced

The Guiding Principles initially established the right not to be arbitrarily displaced with Principle 6. However, the development of this right as a free-standing right is a longer and broader process as it is the case for almost all human rights. The emergence of a human right is a gradual process that starts with the emergence of some social value, or human need, and evolves into a well-established human right.³⁸⁷ Thus, human rights may develop and take form over many years. In light of the idea that human rights have a progressive growth, human rights conventions are often described as ‘living instruments’ and they have to be interpreted in the light of present-day conditions so as to be practical and effective.³⁸⁸

This evolution can to some extent also be witnessed in the context of the prohibition of internal displacement. In the 1990s, UN Secretary-General Kofi Annan described internal displacement as one of the great tragedies of the time and stated subsequently that the need for effective strategies to ensure adequate protection and assistance for IDPs had come onto the international agenda. The magnitude of the IDP crisis and the increasing number of IDPs has been seen as a threat to stability not only for the country where internal displacement occurs but also for the international community as a whole. International recognition of the need for IDPs to receive protection and assistance can be clearly seen with the launch of the Guiding Principles in 1998.³⁸⁹ The recognition process of the right not to be arbitrarily displaced started with the general recognition that a prohibition on forced displacement was implicit in existing IHRL and IHL³⁹⁰, continued with the adoption of a declaration by the UNGA³⁹¹ and was finalised with the adoption of a legally binding

³⁸⁷ Marks, S. (1980) ‘Emerging human rights: A new generation for the 1980s?’ (1980), *Rutgers Law Review*, p.435.

³⁸⁸ For instance, see ‘living instrument’ approach of European Court of Human Rights; *Selmouni v. France*, 25803/94, Council of Europe: European Court of Human Rights, 28 July 1999, para 101. available at: <http://www.refworld.org/cases,ECHR,3ae6b70210.html>

³⁸⁹ Report of the Representative of the SG on the guiding principles on internal displacement 11/02/1998, E/CN.4/1998/53/Add.2, hereinafter the Guiding Principles.

³⁹⁰ see Chapter 3 for a detailed discussion.

³⁹¹ see 2005 World Summit Outcome, A/RES/60/1

Convention in the African region.³⁹² The rights of IDPs have built on these earlier normative understandings to create a new shared understanding on how to respond to the IDP problem.³⁹³ Today, besides the collective interest in regional stability and global peace and security, internal displacement has come to be viewed as a human rights issue, whereby human rights violations are considered in many cases to be at the root of displacement. For two decades, addressing the root causes of the problem of internal displacement has been reformulated in the Guiding Principles in terms of a new human right - the right not to be arbitrarily displaced.

The principal work upon which the analysis that follows is based is the report of 1998 by the Representative of the UN Secretary-General on the Human Rights of IDPs, Francis Deng, on the 'Legal aspects relating to the protection against arbitrary displacement'.³⁹⁴ Even though the Guiding Principles contain the right not to be arbitrarily displaced, the report on the protection against arbitrary displacement was presented to the Commission on Human Rights as a separate report on the same day when the Guiding Principles were presented. Such a report on arbitrary displacement still remains the only one that is dedicated merely to the IDPs' protection from the acts of arbitrary displacement. This thesis argues the fact that being presented as a separate report has shown the need to address this issue of prevention of displacement and has increased the importance of the examination of the right not to be arbitrarily displaced. No explicit mention of a right not to be arbitrarily displaced can be found under existing law³⁹⁵ and in this sense it is considered one of the gray areas in IDP protection.³⁹⁶ This chapter's analysis addresses this less-explored area and analyses normative developments in the past 21 years with respect to the right not to be arbitrarily displaced.

³⁹² see African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009.

³⁹³ Orchard, P. (2019) 'Protecting the Internally Displaced, *supra* note 77, p.21.

³⁹⁴ Report of the Representative of the Secretary-General on legal aspects relating to the protection against arbitrary displacement, 11/02/1998, E/CN.4/1998/53/Add.1.

³⁹⁵ However, the right not to be arbitrarily displaced can be inferred implicitly from Humanitarian law which prohibits displacement in some specific and limited situations and Human Rights law which guarantees freedom of movement and the right to choose one's own residence. For a detailed discussion see Chapter 3: Prohibition of Forced Displacement

³⁹⁶ see 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 Compilation and analysis of legal norms', E/CN.4/1996/52/Add.2, 5 December 1995.

No complete and profound overview and analysis of the evolution of the right not to be arbitrarily displaced in both hard and soft law has been conducted since the late 1990s.³⁹⁷ For this reason, the analysis that follows examines the current status of the right not to be arbitrarily displaced in international law in a more detailed manner, where a substantial amount of state practice and resolutions from UN organs are involved. The Guiding Principles as a soft law instrument and the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)³⁹⁸ as a hard law instrument will be the main sources of the analysis.

While explicit mention of the right not to be arbitrarily displaced is made first in 1998 with the Guiding Principles, discussions on the root cause of displacement date back to the 1980s.³⁹⁹ However, the main focus of these discussions was on solving the world refugee problem, rather than addressing internal displacement. International efforts to solve the problems relating to refugees have concentrated on remedying refugee situations after they came into existence.⁴⁰⁰ But there was a need for prevention of the causes of displacement, which led to greater attempts to identify and understand the root causes of displacement from then on. One of the first studies to place the issue of the root causes of movements on the UN agenda stated that the root causes of situations involving mass exoduses are often complex. They may relate to political or military conflicts, internal or external, to civil strife, persecution or other forms of violations of human rights.⁴⁰¹ In the late 1980s, the importance of addressing the problems of IDPs, and therefore the causes of internal displacement, was much clearer in the UN agenda. For instance, in 1988 the UNGA passed a resolution and requested the Secretary-General to conduct studies in determining whether

³⁹⁷ After Francis Deng's report on protection against arbitrary displacement, Walter Kälin dealt with the arbitrary displacement in one of the sections of 'Annotations' in 2000. The purpose of the Annotations was rather to consider all principles in the Guiding Principles to develop an understanding of their meaning and practical implications. see Kälin, W. (2008). 'Annotations', *supra* note 127.

³⁹⁸ African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009.

³⁹⁹ see United Nations General Assembly resolution on *International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa* in 1988, A/RES/43/116.

⁴⁰⁰ UN General Assembly, *International Co-operation to Avert New Flows of Refugees : Note by the Secretary-General*, 13 May 1986, A/41/324, available at: <https://www.refworld.org/docid/3ae68bee4.html> [accessed 01 September 2019]

⁴⁰¹ Study on Human Rights and Massive Exoduses (1981), United Nations Economic and Social Council, Commission on Human Rights Thirty-eight session, E/OT.4/1503 (1981), para.13.

there was a need to develop a UN Programme to coordinate relief to IDPs.⁴⁰² In 1991, a report on refugees, displaced persons and returnees highlighted the increasing number of displaced people,⁴⁰³ and stated that prevention of complex situations which may generate refugees and displaced persons is one of the major roles of the Secretary-General of the UN.⁴⁰⁴

It has been clearly observed that clarification of the issues related to the root causes of displacement has contributed to the analysis of the link between human rights violations and internal displacement. The causal relationship between human rights violations and internal displacement is revealed in the following two reports, which state that there is no clear statement of the human rights of those at risk of becoming internally displaced: *Analytical Report of the Secretary-General on the Internally Displaced Persons*⁴⁰⁵ and the *Comprehensive Study on the Human Rights Issues Related to Internally Displaced Persons*.⁴⁰⁶ These reports, as well as growing concerns in academic circles over increasing numbers of IDPs reveal that internal displacement is perceived as a human rights issue, indicating further that the causes that led to forced displacement of IDPs should be dealt with as such.⁴⁰⁷ Efforts to address the question of the root causes of displacement led scholars to address whether current international standards adequately protect IDPs from arbitrary displacement. In this sense, ‘the right not to be arbitrarily displaced’ is for the first time explicitly recognised in the Guiding Principles⁴⁰⁸ which frame the discussion on protection

⁴⁰² International Conference on the Plight of refugees, returnees and displaced persons in Southern Africa, adopted by UN General Assembly Resolution UN Doc A/RES/43/116 (1988).

⁴⁰³ UN Economic and Social Council (ECOSOC), *Note / by the Secretary-General pursuant to Economic and Social Council resolution 1990/78 : addendum; report on refugees, displaced persons and returnees, prepared by Mr. Jacques Cuénod, Consultant*, 27 June 1991, E/1991/109/Add.1, available at: <https://www.refworld.org/docid/49997afe4.html> [accessed 07 September 2019], para. 10.

⁴⁰⁴ Ibid. para.24.

⁴⁰⁵ Analytical Report, *supra* note 43.

⁴⁰⁶ UN Commission on Human Rights, *Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Comprehensive study prepared by Representative of the Secretary-General on the Human Rights Issues Related to Internally Displaced Persons*, 21 January 1993, E/CN.4/1993/35.

⁴⁰⁷ For instance, Cohen argues that the international human rights community can play an important role in improving the protection afforded to internally displaced persons. It can develop new international standards and machinery on their behalf. see Cohen, R.(1991) ‘Human Rights Protection for Internally Displaced Persons’, presented at the conference convened by the Refugee Policy Group 24-25 June 1991; also Deng highlighted in the Comprehensive Study that the problems of the internally displaced are so severe and particular that they cannot be adequately remedied by the general law applicable to human rights protection but should instead be addressed separately. See Ibid. para. 55.

⁴⁰⁸ see Guiding Principles on Internal Displacement (1998), Principles relating to Protection from Displacement, (Principles 5 to 9).

from forced displacement as a rights-based problem requiring rights-based solutions for IDPs. As argued above, the Guiding Principles comprised the beginning of the development of this right at the international and national level, and in this sense, such development is also critical for the understanding of the right-based approach to the prohibition of arbitrary displacement. While the following analysis shows how the right-based approach leads to the establishment of obligations to protect IDPs to be imposed upon states, Chapter 5 will show that some states may actually take such obligations further and recognise and implement the right not to be arbitrarily displaced.

4.3. Rights-Based Approach to Internal Displacement

Having discussed in Chapter 3 the legal grounds of the right not to be arbitrarily displaced across international law, the discussion now focuses on the right itself, and what progress we can observe when examining whether and how it has attained the status of a free-standing human right. In this respect, the discussion now analyses how this right can generate obligations and responsibilities that cover the previously neglected aspect of prevention of internal displacement. Internal displacement has the potential to violate a wide range of human rights, and it has been increasingly recognised by academics, states and humanitarian organisations that the denial of IDPs' rights often lie at the root of many problems that the Guiding Principles aim to address. For instance, in its analysis on IDPs in Serbia, UNHCR stated that IDPs were exposed to discrimination in accessing their rights, such as registering their residence and obtaining personal documents, because the root causes of displacement were not addressed in the first place, therefore forcible displacement gave rise to violation of other rights.⁴⁰⁹ In addition to that, the government of Afghanistan acknowledged in its national IDP policy that if forced displacement was left unaddressed, it would result in gross violations of a range of internationally recognized human rights, including the rights to adequate housing, food, water, health, education, work, security of the person, security of the home, and freedom from cruel, inhuman and degrading treatment.⁴¹⁰ Most IDPs' problems arising from the lack of protection against

⁴⁰⁹ UNHCR (2007), 'Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice' p.17, available at: <https://www.refworld.org/pdfid/4704bff72.pdf>

⁴¹⁰ The National Policy of The Islamic Republic of Afghanistan on Internal Displacement (2013),p.27; available at:http://www.internal-displacement.org/sites/law-and-policy/files/afghanistan/Afghanistan_national_policy_English_2013.pdf

arbitrary displacement are intertwined. Thus, we cannot be selective about upholding some rights while denying the right to be protected from arbitrary displacement. For instance, if the state does not provide protection from forced displacement, the basic rights of displaced persons to food, water, shelter and health care are more likely to be undermined.⁴¹¹ Even though state agencies and NGOs perceived right-based approaches differently from others,⁴¹² and may use different strategies, there is a common understanding on basic constituent elements; specifically, promoting and protecting human rights of those who are at risk.⁴¹³ Rights-based approaches are based on the idea that individuals and groups are empowered to claim their rights as rights-holders, and states/governments have binding legal obligations as duty-bearers under IHRL. In this respect, the main idea behind the rights-based approach to displacement is to go beyond the immediate causes of problems or short-term responses to problems by triggering obligations and responsibilities, identifying duty-bearers and ensuring accountability.⁴¹⁴ To put it differently, displaced people not only deserve assistance and protection as a moral obligation of the donor but are also entitled to claim assistance and protection as a legal obligation of the duty-bearers.⁴¹⁵ There are some areas where the shift from a needs-based approach to a rights-based approach is clearly observed within the context of internal displacement. One of these is the United Nations High Commissioner for Refugees' (UNHCR)

⁴¹¹ This explanation points out that human rights are interdependent. For further discussion see Theis, J. (2004), 'Promoting Rights-Based Approaches: Experiences and Ideas from Asia and the Pacific', *Save the Children Sweden*, Stockholm and Bangkok, p.3.

⁴¹² For instance, it has been observed that while the NGO called Save the Children tightly focused on human rights legislation enshrined in international law, especially the legal standards stipulated in the Convention of the Rights of the Child constitute the basis of its work, Oxfam International do not restrict their scope to the rights enshrined in international law but are also clearly focused on addressing inequality such as stating the indivisible link between human rights, economic development and social justice in the countries in which it operates. For a detailed analysis see Harris-Curtis, E., Marleyn, O. & Bakewell, O. (2005), 'The Implications for Northern NGOs of Adopting Rights-Based Approaches', *International NGO Training and Research Centre Occasional Papers Series*, No: 41.

⁴¹³ The website for the Office of the United Nations High Commissioner for Human Rights put forward a definition of a rights-based approach as follows: 'A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.' Available at: www.unhcr.ch/development/approaches.html [accessed 04 September 2019].

⁴¹⁴ This idea can be clearly seen in the Principle 5 of the Guiding Principles stating that 'All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.'

⁴¹⁵ For a detailed discussion on the right-holders and duty-bearers see Boesen, K J. & Martin, T. (2007), 'Applying a rights-based Approach an Inspirational Guide for Civil Society', *The Danish Institute for Human Rights*, p.11.

operational responses for IDPs. Before 1997, most UN development agencies pursued a 'basic needs' approach. They identified basic requirements of beneficiaries and either supported initiatives to improve service delivery or advocated their fulfilment.⁴¹⁶ Since then, the UNHCR continued to work towards building acceptance of the rights-based approach to internal displacement contained within the Guiding Principles.⁴¹⁷ The UNHCR there changed its approach and started to adopt a rights-based approach in the protection of IDPs.

It has been observed that there are many advantages of favouring a rights-based approach to internal displacement. First, it provides clear guidance on the legal standards that are applicable to the situations of IDPs to all stakeholders such as IDPs, governments, armed opposition groups, NGOs, and UN bodies and corporations⁴¹⁸ involved in instances of displacement. Secondly, as human rights apply to everyone,⁴¹⁹ the rights-based approach stands free from the changing political environment. For instance, in cases where a conflict is rooted in racial, ethnic or religious issues, the displaced are perceived as the 'enemy' through their association with an ethnic, religious or social group. Therefore, they are forcibly moved, either by their own government or insurgent groups, as in the case of Myanmar and the Democratic Republic of the Congo.⁴²⁰ Hence, a rights-based approach to displacement implies integrating the principle of non-discrimination, which obliges governments to avoid any biases or discriminatory practices when delivering assistance and providing protection, and to pay special attention to vulnerable groups. In fact, in internal conflicts, displacement is used as a weapon and sometimes even as a goal.⁴²¹ Therefore, it is imperative to increasingly focus on, and respond to, the violation of rights that in turn results in vulnerabilities. Thirdly, a rights-based approach to internal displacement may fill a legal gap where national laws lack standards on protection against displacement, and design

⁴¹⁶ see <https://www.unfpa.org/human-rights-based-approach> (accessed 04 September 2019)

⁴¹⁷ Diagne, K. & Entwistle, H. (2008), 'UNHCR and the Guiding Principles', *FRM-GP10*, Ten Years of the Guiding Principles on Internal Displacement, p.35, available at: <https://www.refworld.org/pdfid/4c6cf2372.pdf> [accessed 04 September 2019]

⁴¹⁸ Stakeholders are categorised in four groups within the context of displacement namely; primary stakeholder, duty-bearer stakeholder, key stakeholder and other possible stakeholder. For further info see Danish Refugee Council 'The Rights-based Approach' available at: <https://drc.ngo/media/1204873/drc-rights-based-approach-folder.pdf>

⁴¹⁹ The universality of human rights is encompassed in the words of Article 1 of the *Universal Declaration of Human Rights*: 'All human beings are born free and equal in dignity and rights.'

⁴²⁰ Cohen, R., & Deng, F. M. (1998). 'Masses in flight', *supra* note 32, p.17.

⁴²¹ *Ibid.* p.6.

assistance and protection within a framework of the relevant international and national legal standards (i.e. the clarification of relevant legal norms applicable to situations of IDPs by looking at international human rights law and humanitarian law), and conventions applicable to the situation in question. However, as Morel points out, there are some challenges to effective implementation of a rights-based approach to the prevention of displacement, as many states have not incorporated international human rights norms in their domestic law and policies.⁴²² Notwithstanding these implementation issues, a rights-based approach still seems to be the most useful approach to address such cases in a more structural manner. In this respect, a right-based approach to the prevention of displacement aims to address the following questions:

- What is the precise content of the right not to be arbitrarily displaced?
- Who is responsible for addressing the violation of the right not to be arbitrarily displaced?
- What are duty-bearers doing to address their responsibilities?

It is believed that tackling displacement at its roots through a rights-based approach contributes to the clarification and interpretation of the right not to be arbitrarily displaced. The analysis now shifts to examining whether the right can meet a number of criteria that help determine its current status as a human right at the international level. Such status may include implicit or explicit recognition and does not determine how the same right may be recognised at the national level, especially because it is possible that certain national frameworks can actually be more advanced in terms of explicit recognition. This dimension of the national level will be fully analysed in Chapter 5.

4.4. The Right not to be Arbitrarily Displaced as a Free-Standing Right

Following from the discussion above, the focus now shifts to analysing some specific criteria that are provided by legal scholars to determine both the status and the content of the right not to be arbitrarily displaced as a human right since the adoption of the Guiding Principles. Part of this analysis of criteria is about a right being consistent with the existing body of

⁴²² Morel M. (2014), 'The Right not to be Displaced in International Law', *supra* note 28, p. 25.

international law, which has already been addressed in detail above in Chapter 3, but will be further elaborated upon because the criterion here is about the right being not merely repetitive of international law, while a number of additional criteria are also discussed. Therefore, the analysis will demonstrate that while the legal grounds in IHL and IHRL discussed above are very much relevant, the status and content of the right covers a much broader range of criteria.

In view of the dynamic nature of human rights, the emergence of new rights to address changing needs and perspectives, as well as to respond to the emergence of new threats to human well-being, is inevitable. Additionally, the adoption of a range of instruments concerning recent global issues, including declarations, policy papers, reports, statements and guiding principles, has served to encourage demands for the recognition of additional rights. Indeed, this is also the case for the creation of a law for the protection of IDPs since the Guiding Principles was launched. By restating the relevant norms applicable to internal displacement in the Guiding Principles, the drafters of the Guiding Principles have contributed to raising awareness of issues relating to internal displacement. This has resulted in an increase in academic studies⁴²³ and reports⁴²⁴ on ways of strengthening international cooperation in solving the problems of IDPs and encouraging universal respect for IDPs' fundamental rights. When the international community unanimously reaffirmed its commitment to the promotion and protection of human rights through the adoption of the Vienna Declaration and Programme of Action in 1993,⁴²⁵ it has been acknowledged that human rights must be a matter of the highest priority for both states and the international

⁴²³ See, e.g., Weiss, Thomas G. (2003), 'Internal Exiles: What Next for Internally Displaced Persons?' *Third World Quarterly*, Vol. 24, No. 3, 429–447; Cohen, R., & Deng, F. M. (1998). 'Masses in flight', *supra* note 32; Cohen R. and Deng, F.M. (eds.) (1998), 'The Forsaken People: Case Studies of the Internally Displaced', *Brookings Institution*, Washington, D.C.; Phuong, C. (2005), 'The International Protection of Internally Displaced Persons' *supra* note 14.

⁴²⁴ See, e.g., UN High Commissioner for Refugees (UNHCR), *Prevention of forced displacement: the inconsistencies of a concept*, April 2010, ISSN 1020-7473, available at: <https://www.refworld.org/docid/4c23257e0.html> [accessed 04 September 2019]; Refugee Studies Centre, *Forced Migration Research and Policy: Overview of current trends and future directions*, April 2011, available at: <https://www.refworld.org/docid/4e5f388e2.html> [accessed 04 September 2019]; UNCHR *Desk Research of the Surveys of IDPs* December 2017, Brookings-LSE Project on Internal Displacement *Mapping the Response to Internal Displacement: The Evolution of Normative Developments*, 2014, available at: <https://www.brookings.edu/wp-content/uploads/2016/06/Mapping-the-Resource-to-Internal-Displacement-The-Evolution-of-Normative-Developments-October-10-2014-FINAL.pdf>; CoE, Committee of Ministers, Recommendation (2006) on internally displaced persons, 5 April 2006

⁴²⁵ Vienna Declaration and Programme of Action, adopted by The World Conference on Human Rights, June 25, 1993, U.N. Doc. A/Conf. 157/23 (1993) [hereinafter Vienna Declaration].

community. Building on the UDHR, Vienna Declaration envisaged a strengthening of human rights norms and institutions at the national and international levels, and recognized the critical role that human rights defenders have to play in the realization of fundamental rights and freedoms. It goes on to state that ‘the universal nature of these rights and freedoms is beyond question’⁴²⁶ and stresses that ‘all human rights are universal, indivisible and interdependent and interrelated.’⁴²⁷ In relation to the protection of IDPs’ human rights, Vienna Declaration’s importance lies in its emphasis on the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable. In this respect, Vienna Declaration recognizes that gross violations of human rights, including in armed conflicts, are among the multiple and complex factors leading to displacement of people and therefore it emphasizes the importance of finding lasting solutions to questions related to IDPs and developing the strategies to address the root causes and effects of movements of refugees and IDPs.⁴²⁸

Restating and clarifying a legal norm, thereby defining explicitly what is implicit in international law, is likely to strengthen the protection of IDPs because vague rights make it difficult to determine whether they are being respected or violated. In this respect, ‘the naming effect’⁴²⁹ should not be underestimated. However, possible risks attached to the proliferation of human rights have been considered in the academic literature. In this context, according to Cranston, the very idea of human rights has been weakened by the proclamation of numerous claims as human rights, which led to diverted attention from far more urgent and practicable claims.⁴³⁰ This idea is also supported by Alston, who warns against inflation of the human rights concept, in the sense that everything one considers good and desirable is called a ‘human right’.⁴³¹ In this sense, it is important to achieve an appropriate balance between the need to maintain the integrity of the existing human rights and the adaptation of a dynamic approach that reflects changing needs and

⁴²⁶ Vienna Declaration Part-I, para.1.

⁴²⁷ Vienna Declaration Part-I, para.5.

⁴²⁸ Vienna Declaration, *supra* note 425.

⁴²⁹ Morel M, Stavropoulou, M. & Durieux, J.F. (2012), ‘The history and status of the right not to be displaced’, *Forced Migration Review*, available at: <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/preventing/morel-et-al.pdf>, p.6.

⁴³⁰ Cranston, M. (1967), ‘Human Rights, Real and Supposed’ in Raphael D. (ed.), *Political Theory and The Rights of Man*, Indiana University Press, p.52.

⁴³¹ Alston, P. (1984). ‘Conjuring up new human rights: Proposal for quality control’, *American Journal of International Law*, 78(3), pp.607-621.

perspectives. Thus, it would seem that rather than trying to avoid the emergence of any new human right, each new human right should be assessed based on its own merits and defects. Moreover, when we consider the dynamic aspect of human rights, the formulation of rights varies over time. The formation of human rights from a legal perspective essentially relates to the conditions under which a certain social value or human need acquires the status of a human right in international law.⁴³² In his assessment on the recognition of the right to development as a human right, Abi-Saab pointed out that law has a progressive growth over a large grey zone separating emerging social values from the well-established legal rule.⁴³³ This is also case for the recognition of the right not to be arbitrarily displaced. In order to solidify the legal content and the scope of this right, it is necessary to identify which claims, values or interests are leading to the formal recognition of a right not to be arbitrarily displaced, and which generation of human rights it belongs to.

In this respect, when we look at the emergence of international human rights, international lawyers point out three generations of human rights in the human rights history. More specifically, 'three generations of human rights' is known for dividing human rights into three separate generations based on (1) civil and political rights; (2) economic, social and cultural rights; and (3) collective or solidarity rights.⁴³⁴ The first generation of rights arose in a revolutionary context⁴³⁵ and they are conceived negatively as 'freedom from' rather than as positive 'rights to'.⁴³⁶ In other words, first generation human rights prohibit state interference in the individual's freedom. Examples are freedom of thought, freedom from arbitrary detention, freedom of expression and freedom of movement. Then, the dynamic nature of the human rights resulted in the emergence of a new generation of human rights as a result of the emergence of new threats to human dignity and abuse of the rights of the first generation.⁴³⁷ This second generation of human rights characterised by the state

⁴³² Morel, M. (2014). 'The right not to be displaced in international law', *supra note 28*, p.37.

⁴³³ Abi-Saab G. (1980) 'The Legal Formulation of a Right to Development', cited from S Marks, S.P. (1981) 'Emerging human rights: A new generation for the 1980s?', 33 *Rutger Laws Review*, p.437.

⁴³⁴ Vašák, K. (1977), 'The Sustained Efforts to give force of law to the Universal Declaration of Human Rights', The UNESCO Courier, p.29. available at: <https://unesdoc.unesco.org/ark:/48223/pf0000074816.nameddest=48063>

⁴³⁵ Marks argues that French and American revolutions have left a permanent imprint on human rights. For further discussion see Marks, S. P. (1981), 'Emerging human rights: a new generation for the 1980s?', 33 *Rutger Laws Review*, pp.437-439.

⁴³⁶ Ibid. p.438.

⁴³⁷ Ibid.

intervention in many things the individual would like to do⁴³⁸ rather than the abstention of the state. Thus, the second generation of human rights emphasised the active role of the state; for example, the right to education and the right to health. In the early 1980s, a third generation of human rights have been expressed in the academic literature: solidarity rights. Vašák described the essential characteristic of these rights as 'they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies and the international community'.⁴³⁹ However, there are some rights that are not listed as third generation of human rights, but they are in this category by nature. For instance, the right to food has been internationally recognised for over forty years and as being in the category of economic, social and cultural rights, it is listed as second generation of rights.⁴⁴⁰ However, in terms of effective implementation, steps have been taken with concerted efforts of states, international organisations and NGOs as a result of the increasing number of people who suffered from food poverty.⁴⁴¹ Thus, in order to eliminate hunger, cooperation and solidarity among all peoples and all nations has been required and this makes right to food a third generation of human right by its nature.

When we look at the right not to be arbitrarily displaced, some common features have been observed with solidarity rights. It is derived from both first generation of human rights (freedom of movement) and second generation of human rights (right to housing).⁴⁴² However, in addition to its individual dimension, it also has a collective dimension, as stated in Principle 25 of the Guiding Principles,⁴⁴³ which implies the duty of the state to take steps through international cooperation to resolving internal displacement at global level. The

⁴³⁸ Gerard, R.W. 'The Rights of Man: A Biological Approach,' in Marks, S. P. (2013), 'On Human Nature and Human Rights', available at: <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/580/2017/06/On-Human-Nature-and-Human-Rights-Final1.pdf>, p.8.

⁴³⁹ Vašák K.(1979) 'For the third generation of human rights: The rights of solidarity', inaugural lecture to the Tenth Study Session of the International Institute of Human Rights', Strasbourg.

⁴⁴⁰ The right to food is derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR). see: article 2(1), 11(1) and 23 of the ICESCR and Article 25 of the Universal Declaration of Human Rights.

⁴⁴¹ Marks, S. P. (1980) 'Emerging human rights', *supra* note 435, p.442.

⁴⁴² Freedom of movement is a civil and political right which derived from Article 12 of the International Covenant on Civil and Political Rights (ICCPR); Right to housing is an economic, social and cultural right derived from Article 11 (adequate standards of living) of the ICESCR. For a detailed discussion see Chapter 3, 'Protection From Displacement under International Human Rights' section.

⁴⁴³ Principle 25(2) of the Guiding Principles: 'International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith.'

general assumption underlying this collective responsibility is based on the notion that, despite the fact that the protection of IDPs should primarily be the responsibility of their state of origin, when the national state fails to fulfil its obligations towards its citizens and persons within its jurisdiction, the international community should be obliged to provide protection to those in need.⁴⁴⁴ In these situations, the negligence or failure of the national state to provide proper protection from the acts of forced displacement makes the involvement of the international community in ensuring the basic rights and needs of vulnerable persons essential. This international involvement serves as a supplementary tool because, as a general rule, the responsibility to provide adequate protection for citizens rests on the relevant states of origin and their national authorities, as stated in Principle 3 of the Guiding Principles.⁴⁴⁵ Moreover, it has been clearly noted by one commentator that solidarity rights have the following features: ‘elaboration of a specialized body of law, an easily identifiable international legislative process, incorporation of the right as a human right within municipal legal systems, and need for concerted efforts of all social actors’.⁴⁴⁶

This evolution can to some extent also be witnessed in the context of internal displacement. First, a revision of legal thinking on internal displacement is provided by the Representative of the Secretary-General in his report, including the ‘Compilation of legal norms relevant to the status of internally displaced persons’.⁴⁴⁷ Then, a conceptual framework, and the human rights implications for identifying the problem of internal displacement, is provided with the Guiding Principles by restating international human rights that are relevant to the protection of IDPs from forced displacement. Finally, more than 60 countries have incorporated the Guiding Principles into laws and policies with a specific mention of IDPs, and the need for protection from arbitrary displacement, which demonstrates the increasing recognition of the right not to be arbitrarily displaced.⁴⁴⁸ Since the adoption of

⁴⁴⁴ Within the context of the IDP-protection, the international community’s responsibility to protect is called as ‘Sovereignty as Responsibility’. For a detailed discussion see Deng, F. (1996), ‘Sovereignty as Responsibility: Conflict Management in Africa’, *supra* note 15.

⁴⁴⁵ Principle 3(1) of the Guiding Principles: ‘National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.’

⁴⁴⁶ Marks, S.P. (1980) ‘Emerging human rights’, *supra* note 435, p.442.

⁴⁴⁷ see Compilation Part-I (E/CN.4/1998/53/Add.1) and Part-II (E/CN.4/1998/53/Add.2) at the website of Office of the United Nations High Commissioner for Human Rights, Human Rights Documents, available at: https://ap.ohchr.org/documents/alldocs.aspx?doc_id=1160

⁴⁴⁸ Some of these countries are Angola, Mexico, Colombia, Russian Federation, Ukraine, Lebanon, Georgia, Azerbaijan, Kenya, Bosnia Herzegovina and Sudan. Full list will be provided in the next section with a detailed analysis on IDP laws and policies.

the Guiding Principles, the problem of protection from forced internal displacement has been reformulated in terms of a new human right, the right not to be arbitrarily displaced.⁴⁴⁹ Indeed, this right is explicitly referred in a legally binding regional Convention.⁴⁵⁰

Following the discussions on the proclamation of new human rights, Alston proposed some sort of quality control in order to decide both the status of a new right as a human right, and its content. According to Alston's qualification criteria, the proposed new human right should:

- '-reflect a fundamentally important social value;
- be relevant, inevitably to varying degrees, throughout a world of diverse value systems;
- be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law;
- be consistent with, but not merely repetitive of, the existing body of international human rights law;
- be capable of achieving a very high degree of international consensus;
- be compatible or at least not clearly incompatible with the general practice of states; and
- be sufficiently precise as to give rise to identifiable rights and obligations'.⁴⁵¹

While some other scholars have developed the list of qualification criteria, most lists include similar criteria.⁴⁵² What is important, and seems to be agreed by academic circles, is that a

⁴⁴⁹ This evolution can also be observed in the following rights: right to clean environment, right to development, right to peace, right to humanitarian assistance, right to benefit from the common heritage of mankind, right to communication. For a detailed discussion see Marks, S (1980) 'Emerging human rights', *supra* note 435, pp.443-450; Alston, P. (1984). 'Conjuring up new human rights: Proposal for quality control', *supra* note 431, pp.612-614.

⁴⁵⁰ Article 4(4) of the Kampala Convention.

⁴⁵¹ Alston, P. (1984). 'Conjuring up new human rights: Proposal for quality control', *supra* note 431 p.615.

⁴⁵² For instance, Marks identified six eligibility criteria for a right to be considered as human right: Marks, S.P. (1980) 'Emerging human rights', *supra* note 435, pp.451-452; Nickels proposed six criteria for justifying specific right as human rights: Nickels, J. (2006), 'Making sense of human rights', *Blackwell Publishing*, second edition, Chapter 5; Morel's list includes eleven elements for a right not to be displaced to be considered as human rights: Morel, M. (2014). 'The right not to be displaced in international law', *supra* note 28, p.47.

right can be considered more established if the identification of a new right includes, first, the rights it attributes to the right holders, second, the obligations imposed on the duty bearers, and third, the clarifications of the conditions for lawful restriction and recognition by the international community. Since the international community refers to states, international organisations, humanitarian agencies and NGOs, the analysis is essential in assessing the development of the right at both the international and national level. The criteria often focus on international aspects, and therefore provide key insights about the development of the right at the international level, but some are also reflective of national developments, which will help frame the discussion of Chapter 5 that will focus extensively on national frameworks.

Thus, the following sections will use the seven Alston conditions to clarify whether the right not to be arbitrarily displaced satisfies the test or has the potential to do so. These eligibility criteria allow us to solidify the content of the right not to be displaced and to identify whether the recognised right not to be displaced is meriting the status of recognised human right. Because these criteria are inter-related and to some extent overlap, the analysis will not examine the criterion of ‘being relevant inevitably to varying degrees, throughout a world of diverse value systems’ separately, but rather consider this as integral to the first criterion, which is about ‘reflecting a fundamentally important social value’. The same approach applies to the criterion of ‘being capable of achieving a very high degree of international consensus’, which will be touched upon while examining the other criteria, such as the general practice of states and the recognition of this right by the UN organs.

4.4.1. Human Rights Should Reflect a Fundamentally Important Social Value

The first criterion concerns that capacity of a right to embody a significant societal value, even though different key values may simultaneously be relevant. The discussion here can begin with the value of a family being secure in their home. The home constitutes not only a means of shelter or a physical building but also a place where somebody should feel secure, comfortable and protected. When people are deprived of their home, they may lose the means to fulfil their fundamental needs as human beings. For instance, acts of arbitrary displacement break up the immediate family. Moreover, it has been reported that

displacement cuts off important social and cultural community ties, precludes or forecloses formal educational opportunities, adequate shelter, and vital health services, and makes the displaced population especially vulnerable to acts of violence, such as attacks on camps, forced disappearance or rape.⁴⁵³ Therefore, arbitrary displacement threatens a whole range of other fundamental rights such as the right to life, the right to food and housing, the right to education and the right to freedom from discrimination. In this sense, claiming a right not to be displaced is needed not only for life but also for a life of dignity.⁴⁵⁴ As the preamble of the two International Human Rights Covenants put it, human rights 'derive from the inherent dignity of the human person'.⁴⁵⁵ In other words, moral values underpin the human rights claim, and human rights are a part of the integrity and dignity of the human being.

In the context of IDP protection, the displaced people's need to feel at home and to be protected against being deprived of their home is also a universal social value. This can be clearly observed in the UN instruments. For instance, the resolutions concerning the right to housing, freedom of movement and housing and property restitution adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights are closely linked with IDP situations. The need to develop an effective mechanism designed to resolving outstanding housing and property problems of IDPs, as well as refugees, has been emphasised in these resolutions.⁴⁵⁶ The need for, and the importance of property rights of displaced people even led to the endorsement of the UN Principles on Housing and Property Restitution for Refugees and Displaced People (Pinheiro Principles).⁴⁵⁷ In fact, the right not to be displaced was seen as important for property restitution for displaced people and the protection of their right to housing in the Pinheiro Principles. While the Pinheiro Principles' focus is on restitution rights within the context of displacement, they also address the

⁴⁵³ Kälén, W and Goldman, R.K. (1998) 'Legal Framework' in Cohen, R., & Deng, F. M. (1998). 'Masses in flight', *supra* note 32, p. 74.

⁴⁵⁴ Donnelly argues that we have human rights not to requisites for health but to those things needed for a life of dignity, a life that cannot be enjoyed without these rights. see Donnelly, J. (1993) 'Universal human rights in theory and practice', *Cornell University Press*, Third Printing, p. 17.

⁴⁵⁵ Preamble, para. 3 of the ICESCR and ICCPR.

⁴⁵⁶ See UN Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 1995/13 on the Right to Freedom of Movement*, 18 August 1995, 1995/13; *Resolution 1996/9 on the Right to Freedom of Movement*, 23 August 1996, E/CN.4/Sub.2/1996/L.16; *Resolution 1997/29 on Freedom of Movement and Population Transfer*, 28 August 1997, E/CN.4/Sub.2/RES/1997/29; *Resolution 2002/7 Housing and Property Restitution in the Context of Refugees and Other Displaced Persons*, 14 August 2002, E/CN.4/Sub.2/RES/2002/7.

⁴⁵⁷ UN Principles on Housing and Property Restitution for Refugees and Displaced People (Pinheiro Principles), UN Doc. E/CN.4/Sub.2/RES/2005/21

prevention of displacement.⁴⁵⁸ In this sense, the human need to feel at home is intended to be reinforced by preventing the arbitrary deprivation of one's home in the first place. However, this underlying social value, the need for protection against displacement from home, needs to be strengthened by legal protection against arbitrary forms of displacement.

There is, indeed, a constructive interaction between the moral vision of human rights and the legal right not to be displaced which shapes state behaviour through the practice of human rights. In other words, increased attention to the underlying desire for the prevention of unlawful displacement with the right not to be arbitrarily displaced would lead to close scrutiny of the acts of displacement. States indeed generally refrain from or publicly condemn clear cases of forcible, arbitrary displacement. It has been clearly demonstrated by Orchard that states have shown different attitudes towards the protection of IDP rights before and after the recognition of the Guiding Principles.⁴⁵⁹ The express recognition of the human rights of IDPs with the Guiding Principles has become the way ahead to raise general international awareness of the illegality of many displacement situations. Therefore, the promotion of IDP- rights is seen as a legal obligation of states.⁴⁶⁰ Since the norms concerning the protection of the IDPs become explicit with the launch of the Guiding Principles in 1998, states feel obliged to seek justifiable reasons for their acts of displacement. This leads to a change in state behaviour. Such change in state behaviour can be observed in two cases regarding the closure of IDP camps in Rwanda and Russia. What is common in these cases is that many displaced people were arbitrarily removed from camps and forced to return to the areas where they left for security reasons. However, state behaviour is different towards the protection of IDP rights before and after the recognition of the Guiding Principles. Before the creation of the Guiding Principles, the closure of the Kibeho camp in Rwanda in 1995 ended up with forced displacement of IDPs to places where

⁴⁵⁸ Article 5(1) of the Pinheiro Principles states that "Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence".

⁴⁵⁹ Orchard, P (2010), 'Protection of internally displaced persons', *supra* note 11, pp.281-303.

⁴⁶⁰ For instance, human rights and fundamental freedoms are reflected as moral and legal imperatives of the society in the United Kingdom's Annual Report presented to the Parliament by the Secretary of State for Foreign and Commonwealth Affairs, Human Rights, Annual Report 2006, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408402/human-rights-06.pdf; also Boyle and Chinkin argue that human rights provide the ethical foundation of international law, see Boyle, A. & Chinkin, C. (2007), 'The Making of International Law', *Oxford University Press*, p.16.

their life, safety, and/or health would be at risk. When Rwanda arbitrarily displaced people from IDP camps without providing any justifiable reasons, Rwanda's responsibility to protect its own IDPs was not placed on the international agenda and Rwanda did not seek to find solution to the plight of IDPs when arbitrarily displaced people from the camps. After the creation of the Guiding Principles, when the Znamenskoye camp in Russia was closed in 2002, the government of Russia sought to justify its actions by arguing that the closures were in the best interests of the IDPs and IDP rights were protected in accordance with the Guiding Principles.⁴⁶¹ Indeed, Russian authorities planned to restore 15 hostels to resettle the thousands of displaced people.⁴⁶² The protection of IDP rights has already gained its increased attention from the international community with the Guiding Principles in 2000s and therefore states were aware of their responsibility to protect their displaced populations. More importantly, these justifications, along with widespread international condemnation of the closures, were aimed at the international audience and lend credence to the view that states have begun to recognise a norm of prevention of arbitrary displacement and forcible return in the IDP-protection context, even though this is anchored solely in soft law.⁴⁶³ Additionally, acts of forced displacement have been condemned by the UNGA or the UNSC as a violation of IHL and IHRL, and are therefore considered unlawful on many occasions.⁴⁶⁴ To put it differently, on the one hand, the limits and requirements of state action are set by the rules concerning the protection from displacement; on the other hand, rights-based demands for social change are also promoted by the international community and key actors, such as the UN.

Indeed, this shows the constructive interaction between human rights and state practice. When we look at this constructive interaction between human rights and state practice in detail, it is clearly stated by one commentator that human rights set a standard for the

⁴⁶¹ Ibid. at 285.

⁴⁶² Wines, M. (2002), 'Chechen Refugee Camps: Once a Haven, but After Two Years Still Not a Home', The New York Times, available at: <https://www.nytimes.com/2001/12/27/world/chechen-refugee-camps-once-a-haven-but-after-two-years-still-not-a-home.html>

⁴⁶³ Ibid.

⁴⁶⁴ For instance, in its resolution on Protection of and Assistance to IDPs, UNGA recognised that in conflict situations forced displacement constitutes the violation of international humanitarian law, A/RES/72/182(2017), p.3; also see A/RES/70/165(2015), A/RES/60/168(2005). Moreover, the SC also emphasised violence and violations and abuses of human rights and violations of international humanitarian law in parts of the DRC as a result of the forced displacement of significant numbers of civilians, S/RES/2463 (2019),p.2; also see S/RES/2389 (2017), S/RES/2417 (2018).

state's political legitimacy: 'to the extent that governments protect human rights, they and their practices are legitimate'.⁴⁶⁵ This argument seems reasonable and can be expanded as human rights claims arise when these rights are violated or denied. In other words, where human rights are effectively protected, people continue to have human rights, but there is no need or occasion to use them unless the enjoyment of this right is threatened by state act. In the context of internal displacement, the argument that IDPs have a right not to be arbitrarily displaced occurs as a result of these people's need to be protected and/or the denial of the enjoyment of their rights. It is widely recognised that human needs give rise to human rights, or human rights can be grounded in human needs.⁴⁶⁶ In this respect, the need for IDPs' protection from arbitrary displacement is undeniable, and it is argued that the frequent reference to the right of IDPs not to be arbitrarily displaced in the instruments would lead to increased attention to the underlying desire of people to feel safe and secure in the places where they live. More specifically, 'when a human right is frequently unnamed, it risks being largely unobserved'.⁴⁶⁷ Therefore, it is necessary to define and use the term 'the right not to be arbitrarily displaced' to show that this human right reflects an important social value. The conclusion here is that the right not to be arbitrarily displaced indeed meets this first criterion, and this can be evident at both the international and the national level.

4.4.2. Human rights should be consistent with, but not merely repetitive of, the existing body of international human rights law

The second criterion is about consistency with international law and the right's precise content, and therefore will show that the criterion is not only about having a legal ground in international law, as discussed in Chapter 3, but advancing a new understanding of responsibility in the international community. The right not to be arbitrarily displaced derives from some well-established human rights, in particular the right to freedom of movement, the right not to be deprived of his or her property by being forcibly displaced to

⁴⁶⁵ Donnelly, J. (1993) 'Universal human rights in theory and practice', *supra* note 454, p.14.

⁴⁶⁶ For further discussion see Renzo, M 'Human Needs, Human Rights' p. 570 in Cruft, R., Liao, S.M. and Renzo, M. (2015), 'Philosophical foundations of human rights', *Oxford University Press*; also see Donnelly, J. (1993) 'Universal human rights in theory and practice', *supra* note 454.

⁴⁶⁷ Morel, M. (2014). 'The right not to be displaced in international law', *supra* note 28, p.242.

another location, and the right to housing.⁴⁶⁸ It is also based on IHL rules concerning the prohibition of forced displacement.⁴⁶⁹ Indeed, the right not to be arbitrarily displaced, apart from being explicitly recognised in international soft law, is implicitly grounded in the existing international law. This means that as a right that derives from well-established IHL rules it is consistent with IHRL. It is also a right that derives from well-established human rights which means it is consistent with IHRL. The fact that it is consistent with IHRL does not mean that the right not to be arbitrarily displaced does not have its own particular focus. Such focus is a new commitment to the pre-displacement that is not addressed by other well established IHRL rules. As human rights evolve, the right not to be arbitrarily displaced is an updated version of some traditional rights, emerging as part of an on-going process of evolution as circumstances change. In this respect, the evolution of human rights is potentially applicable to the current status of the right not to be arbitrarily displaced.

The right not to be arbitrarily displaced is closely linked with the exercise of freedom of movement and choice of residence, and the right to freedom of movement is inherently breached when arbitrary displacement occurs, because arbitrary displacement deprives a person of the choice of moving or not and of choosing where to reside. In this respect, the well-established right to freedom of movement can be inferred from the newly emerged right not to be arbitrarily displaced. However, it is not sufficient to merely affirm that the right to freedom of movement always guarantees the enjoyment of the right not to be arbitrarily displaced. Case law reveals that regional human rights bodies have interpreted differently the violation of freedom of movement in relation to displacement. For instance, while the ACmHPR took the view that the right to freedom of movement and residence implies protection against arbitrary internal displacement for people lawfully residing in the territory of Sudan,⁴⁷⁰ the IACrtHR considered the violation of the right to freedom of movement only in the context of the violation of the right to return.⁴⁷¹ However, no mention is made of the state's obligation to take active steps to prevent people from being

⁴⁶⁸ This list can also be expanded to include the right to life, right to liberty and security of the person. see the statement of former UN High Commissioner (Sadako Ogata) for Refugees, in Reoch R. (1994), 'Human Rights: The new consensus', *Regency Press and UNHCR*, London.

⁴⁶⁹ For a detailed discussion see Chapter 3.

⁴⁷⁰ The African Commission have made specific reference to Principle 5 of the Guiding Principles requires States to prevent or avoid situations that might lead to displacement. This reasoning is understood as a violation of the right not to be arbitrarily displaced. see ACmHPR, *COHRE v. Sudan*, Communication NO. 296/05, para. 188.

⁴⁷¹ IACrtHR, *Moiwana Village v. Suriname*, Ser. C No.124 (2005).

forced to flee from their lands. Therefore the right not to be arbitrarily displaced was not covered in this kind of situations the protection gap can be filled with the new human right of not being arbitrarily displaced, which also clearly addresses the pre-displacement phase by providing a non-exhaustive list of conditions to assess the arbitrariness of displacement, by specifying the conditions for lawful limitations of this right and by identifying the rights and obligations. So, the right not to be arbitrarily displaced is filling the gap⁴⁷², which is vaguely addressed in the rights that it derived from; namely, the right to freedom of movement, the right to housing and the right to choose one's own residence. In this sense, its content is not merely repetitive of existing human rights, it is rather complementary. This view can also be seen in the report presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stating that human rights standards are useful in defining the conduct of states in the protection of populations against arbitrary displacement as well as in the course of displacement.⁴⁷³ In this respect, the recognition of the right not to be arbitrarily displaced would result in strengthened legal protection against arbitrary forms of displacement by modifying some movement-related rights according to new human needs and changing circumstances. Actually, based on this conclusion, Principle 6 (right not to be arbitrarily displaced) of the Guiding Principles was formulated.⁴⁷⁴

While the above-mentioned rights found in the Covenants constitute an important legal foundation against forced displacement, it cannot be concluded that their violation breaches the prohibition of arbitrary displacement in each case. By the same token, victims of arbitrary displacement suffer unique harms not captured by other categories of fundamental human rights.⁴⁷⁵ Since the victims of forced displacement rely on the implicit protection guaranteed by other human rights, it often requires clarification of the violation of the right not to be arbitrarily displaced in the long legal reasoning provided by the Human Rights Courts. The protection capacity and the content of the right not to be arbitrarily

⁴⁷² The precise content of the right not to be arbitrarily displaced is discussed further in this Chapter.

⁴⁷³ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'The human rights dimensions of population transfer, including the implantation of settlers', UN DOC E/CN.4/Sub.2/1994/18 30 June 1994, para.124.

⁴⁷⁴ It is necessary define explicitly what is at present inherent in international law- a right to be protected against arbitrary displacement. See Compilation Part-II, *supra* note 212, para. 88.

⁴⁷⁵ Simons M. (2002), 'The emergence of a norm against arbitrary forced relocation', *Colombia Human Rights Review* 95, p.111.

displaced remains vague if it is not explicitly referred as a free-standing human right and if it is only implicitly inferred from the other movement-related rights.⁴⁷⁶

All these aspects of the right not to be arbitrarily displaced reveal that its scope is not merely repetitive of the existing body of international law or merely compatible with international legal rules, as it derives from well-established rights. The right also creates new obligations that were not covered by existing international law because it identifies a new area that is focused on the prevention of internal displacement, which means that the right also meets the second criterion.

4.4.3. Human Rights should be sufficiently precise as to give rise to identifiable rights and obligations

The third criterion focuses on the capacity of a right to reach a level of precision that creates identifiable rights and obligations. While the analysis above showed that the right does cover a new focus with regards to IDP rights, this third criterion is about the degree to which this focus can translate into specific state obligations. In order to understand the state's duty to respect the right to be protected against arbitrary displacement, it is necessary to clarify which instruments formally recognised the right not to be arbitrarily displaced and what is the content of the right in these instruments. The right not to be arbitrarily displaced has been explicitly recognised in both hard and soft law at the international, regional and sub-regional level. At the international level, it has been explicitly recognised for the first time in the Guiding Principles with Principle 6, in the London Declaration of International Law Principles on Internally Displaced Persons⁴⁷⁷ with Article 4(1), and also in Principle 5(1) of the Pinheiro Principles. At the regional level, this right is explicitly recognised in the legally binding Kampala Convention⁴⁷⁸ with article 4(4). Finally, at the sub-regional level, many of the countries that experience some of worst forms of internal displacement in the

⁴⁷⁶ See Chapter 3, section 'The Prohibition of Forced Displacement under International Human Rights Law'.

⁴⁷⁷ International Law Association(2000), *International Law Association, Declaration of International Law Principles on Internally Displaced Persons*, adopted by the 69th Conference of the International Law Association, held in London, United Kingdom (hereinafter London Declaration on IDPs)

⁴⁷⁸ Kampala Convention entered into force in 2012.

Great Lakes region⁴⁷⁹ had adopted the first ever legally binding instrument concerning IDPs (Great Lakes Protocol relating to internal displacement)⁴⁸⁰ and recognised the right not to be arbitrarily displaced with Articles 3(1) and 6. In addition to that, the right not to be arbitrarily displaced has been recognised in Article 16(1) of the Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries adopted by the International Labour Organisation.⁴⁸¹ The right in the ILO Convention No. 169 does not specifically concern IDPs but the indigenous people or groups with a special dependency on, and attachment to their lands, are also under the category of concern in the Guiding Principles⁴⁸² as they are potential IDPs in case of development projects. Although the name of the right not to be arbitrarily displaced is the same in these soft and hard law instruments, the scope of the right and the obligations which it attributes to the states may vary depending on the which instrument it is included. Therefore, a detailed analysis would reveal the type of obligations that this right gives rise to the states or other actors.

Three types of state obligations are applicable to all human rights; namely, obligations to respect, obligations to protect and obligations to fulfil.⁴⁸³ This also means that in the context of protection against arbitrary displacement, states have three levels of duty arising from the right not to be arbitrarily displaced. The right not to be arbitrarily displaced, at the first level constitutes a prohibition of deprivation of enjoying the right not to be displaced without state interference, thus states refrain from actively forcing people to leave their homes or places of habitual residence (duty to respect). At the second level, it calls for the adoption of some precautionary measure by the states to protect their own nationals' right not to be arbitrarily displaced from threats emanating from third parties, for example, private actors or particular situations like natural disasters (duty to protect). At the third level, in order to enjoy the right, it requires the state to take steps to create legal, institutional and procedural conditions (duty to fulfil). These categories of obligations help us to determine whether a state has violated the human rights of an individual in a

⁴⁷⁹ 11 states in the Great Lakes Region were adopted the Great Lakes Protocol namely; Angola, Burundi, Central African Republic, Republic of Congo, Kenya, DRC, Rwanda, Sudan, Tanzania, Uganda and Zambia.

⁴⁸⁰ Great Lakes IDP Protocol, *supra* note 31.

⁴⁸¹ Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries adopted by the International Labour Organisation in 1989 and in force since 1991. (hereinafter ILO Convention No. 169).

⁴⁸² Principle 9 of the Guiding Principles pays special attention to the protection against the displacement of indigenous peoples, minorities, peasants, pastoralist.

⁴⁸³ Kälin W. & Künzli J.(2010), 'The Law of International Human Rights Protection', *supra* note 173, pp. 96-97.

particular case. In consideration of the right not to be arbitrarily displaced, the following remarks can be made:

The right not to be arbitrarily displaced is not an absolute right in cases of armed conflict, natural disasters and development projects. It includes limitation clauses which may allow state interference under certain conditions. For instance, while Principle 6(1) of the Guiding Principles strictly prohibits arbitrary displacement, the following paragraph (2) lists a series of circumstances as not constituting arbitrary displacement. However, in cases not covered by an exception, any interference with the right automatically constitutes a human rights violation. For instance, when displacement caused as a result of apartheid, ethnic cleansing and collective punishment, there is no permissible ground for these acts and they are considered arbitrary in any ground as they are absolutely prohibited under international law.⁴⁸⁴ This is regarded as important in an IDP-protection context because in most cases of forced internal displacement, ethnic cleansing was not a by-product of criminal activity or conflict but a deliberate policy.⁴⁸⁵ What is important here is to determine whether state acts can be legally justified. If the conditions for lawful limitations of a right cannot be found, then these acts are deemed arbitrary.⁴⁸⁶ In this sense, when we look at the content of the right not to be arbitrarily displaced, it provides the substantive standard for the impermissible grounds and conditions of displacement (the requirement of compliance with international law), and also the minimum procedural standard to determine the arbitrariness of the displacement.⁴⁸⁷ Nowak described the substantive and procedural standards as 'due process of law', which means that substantive due process looks to whether there is a substantive sufficient justification for such a deprivation of a right while procedural due process relates to how law is implemented and enforced.⁴⁸⁸ In this regard, substantive standards of law create, define, and regulate the rights, duties, and powers of

⁴⁸⁴ See Article 7 (crimes against humanity) of the Rome Statute of the International Criminal Court, also see Article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid

⁴⁸⁵ For instance one of the main reasons for the forced displacement of civilians in Bosnia-Herzegovina is the acts of ethnic cleansing, for a detailed report see Gelazis, N. (2005) 'The Tenth Anniversary of the Dayton Accords and Afterwards: Reflections on Post-Conflict State- and Nation-Building', *East European Studies*; also see Forced Migration Review issue 50 (2015) 'Dayton +20: Bosnia and Herzegovina twenty years on from the Dayton Peace Agreement'.

⁴⁸⁶ Kälin & Künzli provided a detailed checklist of the constitutive elements of a human rights violation. The limitations on right not to be arbitrarily displaced has been considered according to this checklist. see ⁴⁸⁶Kälin W. & Künzli J. (2010), 'The Law of International Human Rights Protection', *supra* note 173, p.150.

⁴⁸⁷ Compilation Part-II, *supra* note 212, para. 88.

⁴⁸⁸ Nowak, M. (2005), 'U.N. Covenant on Civil and Political Rights: CCPR Commentary', *supra* note 359, p.305.

parties; while procedural standards of law give a step by step action plan on how the case is supposed to proceed in order to achieve the desired goals. Therefore, substantive standards protect certain fundamental rights from government interference and prevent governments from impacting citizens in an abusive way. Procedural standards of law are not directed at requiring states parties to refrain from doing something but rather require them to undertake extensive positive measures to ensure these guarantees. Specifically, in the context of protection from arbitrary displacement, substantive standards of law highlight the duty of states to refrain from, prohibit and prevent arbitrary displacement of an IDP from being deprived of his or her property when forcibly displaced to another location. Procedural standards of law highlight strategies for minimising displacement and avoiding the adverse effect of displacements⁴⁸⁹ such as seeking the informed consent of displaced persons.⁴⁹⁰

The inclusion of substantial and procedural standards in the right not to be arbitrarily displaced also gives rise to the substantive and procedural obligations of states. For instance, the conditions in paragraph 2 of the Principle 6 in the Guiding Principles give meaning to the notion of arbitrariness in the context of displacement and therefore help to understand state responsibility in cases of arbitrary displacement.

Principle 6 of the Guiding Principles provides that:

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
 - (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
 - (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;

⁴⁸⁹ Principle 7(1) of the Guiding Principles.

⁴⁹⁰ Principle 7(3) of the Guiding Principles.

(c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;

(d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and,

(e) When it is used as a collective punishment.

In relation to armed conflict, displacement will be considered non-arbitrary where it is premised on the need to protect the civilian population or for the realisation of certain military exigencies. In situations of disasters, displacement is permissible if the safety and health of those affected requires their evacuation and thus non-arbitrary. Finally, in situations of large-scale development projects, displacement will be considered non-arbitrary where it is for compelling and overriding public interest.

In the light of these explanations, it would be useful and practical to highlight the duty of states to refrain from, prohibit and prevent arbitrary displacement of IDPs with the wordings of relevant articles of the instruments that dealt with IDP rights.

Principle 6 of the Guiding Principles served as the basis for the provisions of other instruments dealing with the prohibition of displacement. For instance, the Kampala Convention heavily mirrors the Guiding Principles in its recognition of the right not to be arbitrarily displaced and makes an explicit reference to them in its preamble as an important international framework for the protection of IDPs. Article 4 of the Kampala Convention also includes four main aspects of prohibition of arbitrary displacement covered in the Guiding Principles with the same wording, namely; displacement based on ethnic discrimination, armed conflict and natural disasters, and displacement as a collective punishment.⁴⁹¹ Relevant provision on the protection from arbitrary displacement in London Declaration on IDPs was also inspired by the Guiding Principles⁴⁹² as '[f]reedom of movement, including the right not to be arbitrarily displaced, shall be respected to the fullest extent possible in accordance with international law'.⁴⁹³ In the same sense, the Great Lakes IDP Protocol

⁴⁹¹ Namely Article 4(4) (a), (b), (f), and (g).

⁴⁹² Preamble, para.6 of the London Declaration on IDPs states that 'Taking into account the Guiding Principles on Internal Displacement'.

⁴⁹³ Article 4(1) of the London Declaration on IDPs.

recognised the Guiding Principles as a source for the regional framework and obliges states to adopt and implement the Guiding Principles,⁴⁹⁴ and gives responsibility to member states ‘to prevent arbitrary displacement and eliminate the root causes of displacement’.⁴⁹⁵

The key word in all these articles is the term ‘arbitrary’, which provides the conditions under which displacement can be carried out without violating international law, thus without being arbitrary.

However, with respect to the notion of arbitrariness embedded in the term ‘arbitrary displacement’, some differences can be observed between the Guiding Principles and the Kampala Convention. Article 4 of the latter instrument provides a non-exhaustive list of acts that are considered to amount to arbitrary displacement. In addition to the above-mentioned forms of arbitrary displacement in the Guiding Principles, the Kampala Convention states that displacement caused by harmful practices is arbitrary.⁴⁹⁶ Particular focus is given to harmful practices because there are some traditional practices in some African countries that might constitute persecution of a certain gender or certain age group. For instance, the Independent Federal Asylum Review Board of Austria granted asylum to two Cameroonian women and a 14-month-old Ethiopian baby girl and her mother, who had fled in order to avoid female genital mutilation.⁴⁹⁷ The Board concluded that the applicant had a well-founded fear of persecution on account of their membership of a particular social group.⁴⁹⁸ Before their asylum procedure, the applicant and her baby felt obliged to move to another region within Ethiopia based on the fear to be subjected to genital mutilation.⁴⁹⁹ It can be observed from this case that the persons granted asylum were actually IDPs before they became refugees. Therefore, there is ground for arguing that IDPs can also be victims of harmful practices which can constitute persecution. This allows us to clearly identify

⁴⁹⁴ Article 6 of the Great Lakes IDP Protocol.

⁴⁹⁵ Article 3 (1) of the Great Lakes IDP Protocol.

⁴⁹⁶ Article 4(e) of the Kampala Convention.

⁴⁹⁷ *Case Regarding Female Genital Mutilation of a Cameroonian Woman*, GZ 220.268/0-XI/33/00, Austria: Independent Federal Asylum Review Board (UBASG), 21 March 2002; *Case Regarding Female Genital Mutilation of an Ethiopian Baby Girl (Summary)*, Austria: Independent Federal Asylum Review Board (UBASG), 5 June 2002.

⁴⁹⁸ English translation is provided by UNHCR Branch Office Vienna. Also see for the full list of case law in English at Rights in Exile Programme, available at: <http://refugeelegalaidinformation.org/fgmc-case-law-and-other-legal-documents>

⁴⁹⁹ *Case Regarding Female Genital Mutilation of an Ethiopian Baby Girl (Summary)*, *supra* note 497, Key Fact and Legal Reasoning

persecution as a cause of displacement. In addition to that, burning of widows and dowry killings are extensively practised in Africa.⁵⁰⁰ Obviously, harmful practices hardly present situations similar to those triggered by armed conflict or generalised violence, but in Africa such practices may constitute sufficient reason to displace people. It is assumed that the reason for including harmful practices in the category of arbitrary displacement is that these acts create a coercive environment that causes fear of violence.

Another difference observed between the Guiding Principles and the Kampala Convention is with regard to arbitrary displacement associated with developments projects. Article 7 of the Guiding Principles and Article 5 of the Great Lakes IDP Protocol require a 'compelling and overriding public interest' to justify development-induced displacement; therefore, if the displacement is carried out without such compelling and overriding interest, it is considered arbitrary. Unlike the Articles in the Guiding Principles and the Great Lakes IDP Protocol, the Kampala Convention does not clarify under what circumstances development projects may generate arbitrary displacement.⁵⁰¹ However, this seems to be a disadvantage in terms of deciding the state obligation in cases of development projects, and weakens the protection measures afforded within the context of protection from arbitrary displacement of people caused by development projects. This is for the following reason: Article 10 of the Kampala Convention states that the parties are required to prevent displacement caused by development projects 'as much as possible'. Since the term 'as much as possible' is not clear on the yardstick against which to assess compliance by states with the duty, this may open the door to abuses by states claiming that they did as much as possible to prevent development-induced displacement, seeking to justify their forced acts of development-induced displacement. Nonetheless, the Kampala Convention does not specify that development projects have to be large-scale projects (as is provided in the Guiding Principles), and this may also allow for the consideration of even small-scale development projects and their effects in order to decide the responsibility of a state. It has been observed that the Great Lakes IDP Protocol provides for the most detailed state

⁵⁰⁰ In its General Comment No.28, Human Rights Committee stated that these harmful acts are the violation of right to life. See UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10.

⁵⁰¹ The Kampala Convention includes the requirements of 'compelling and overriding public interest' only in the case of projects to be carried out in areas of communities with special attachment to and dependence on land. See Article 4(5) of the Kampala Convention.

responsibility in terms of development-induced displacement.⁵⁰² It includes two criteria which are the core of the permissible grounds for development induced-displacement in the Protocol: first, IDPs are to be fully informed of the reasons and procedures concerning development-induced displacement; and second, the consent of the IDPs must be obtained. It is unfortunate that these criteria are not included in other instruments concerning the arbitrary displacement of IDPs⁵⁰³ neither in development-induced displacement nor in any other reasons that cause displacement. These criteria have an important role in respecting the rights of IDPs. If voluntary and informed consent of IDP is sought by states, this would be effective both in meeting IDPs' needs and efficiently allocating public resources.

Moreover, states have an obligation under the Kampala Convention and the Guiding Principles to provide assistance and protection to those displaced by natural disasters. Situations of natural disasters are not covered in the Great Lakes IDP Protocol or in ILO Convention No.169. Threats to human rights due to natural disasters lay behind the positive obligation of states to take appropriate steps to safeguard the lives of those within their jurisdiction.⁵⁰⁴ In this respect, the obligation to protect has two aspects: preventive and remedial.⁵⁰⁵ On the preventive level, states have a duty to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the natural disaster risk.⁵⁰⁶ Displacement as a result of natural disasters is considered arbitrary in both the Guiding Principles and the Kampala Convention if it is not justified by reasons of the safety and health of those affected.⁵⁰⁷ While, there are no specific minimum standards under the Guiding Principles with respect to natural disasters, states are required to establish disaster risk reduction strategies and disaster preparedness mechanisms for the prevention of arbitrary displacement under Article 4 (2) of the Kampala Convention. In addition, on the remedial level, not only are states required to take steps to prevent the consequences of

⁵⁰² Article 5 of the Great Lakes Protocol.

⁵⁰³ The requirement of 'free and informed consent' only included in Article 16(2) of the ILO Convention No. 169 concerning the indigenous people but not all IDPs as a whole.

⁵⁰⁴ *Budayeva and Others v Russia*, ECtHR (Grand Chamber), Application No.s 15339/02, 21166/02, 20058/02 and 15343/02 (2008).

⁵⁰⁵ Kälin W. & Künzli J.(2010), 'The Law of International Human Rights Protection', *supra* note 173, p.97.

⁵⁰⁶ *Budayeva and Others v Russia*, *supra* note 504, para.132.

⁵⁰⁷ The Guiding Principles Principle 6(2)(d), Kampala Convention Article 4(4)(f).

disasters, but they are also required to make reparation to IDPs in the event of natural disasters.⁵⁰⁸

In situations of armed conflict, only the Kampala Convention and the Guiding Principles include provisions dealing with conflict-induced displacement, and displacement of populations during armed conflict is considered arbitrary unless it is justified by the ‘security of the civilians involved or imperative military reasons’.⁵⁰⁹ In its General Comment on Freedom of Movement, the Human Rights Committee (HRC) repeatedly highlighted the requirements of proportionality and necessity of the restrictions.⁵¹⁰ In the context of displacement, the assessment of necessity is imperative in order to avoid becoming a pretext for illegitimate aims, such as using civilians as human shields or using displacement as a tool of war to punish a specific population, such as IDPs, that belongs to the same ethnic group as the enemy.

Preliminary examinations and investigations of the International Criminal Court (ICC) reveal that most cases decided by the ICC contain the crime of forcible transfer of populations under the category of crimes against humanity.⁵¹¹ Since the movements of people in the context of conflict are most often arbitrary displacements in violation of IHRL and IHL, when any party to an armed conflict raises military or security necessity as reasons for the displacement, close scrutiny of the motives and objectives of this act is necessary. Thus, states need to show that the application of restrictions in any individual case must be based on clear legal grounds.⁵¹² In this respect, the test of necessity has been made clear in Additional Protocol II where it is noted that if displacement has to be carried out, the provision of minimum necessities such as shelter, hygiene, health, safety and nutrition should be included in the acts of displacement.⁵¹³

⁵⁰⁸ Kampala Convention Article 12(3).

⁵⁰⁹ Kampala Convention Article 4(4)(b), The Guiding Principles Principle 6(2).

⁵¹⁰ HRC General Comment 27, *supra* note 358, para.16.

⁵¹¹ For instance, the Prosecutor of the ICC charged Omar Al Bashir with forcefully transferring people without any legal justification. *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09; also see the ICC investigations in the DRC. The Prosecutor issued a press release acknowledging that alleged crimes including forced displacement were reported since the 1990s. *Situation in the Democratic Republic of the Congo* ICC-01/04 available at: <https://www.icc-cpi.int/drc>; also see Reports on Preliminary Examination Activities, (The Office of the Prosecutor) which includes forcible transfer of population as alleged crimes in countries such as Colombia and Myanmar. available at: <https://www.icc-cpi.int/pages/pe.aspx>

⁵¹² HRC General Comment 27, *supra* note 358, para.16.

⁵¹³ Article 17(1) of the Protocol II.

The requirement of proportionality is also important in assessing the arbitrariness of the state's interference with a human right. The HRC treats as arbitrary an interference with a right if it is not proportionate to the circumstances. To put it differently, the displacement must be proportionate in light of its invoked purpose,⁵¹⁴ meaning that the state must strike a fair balance between the private interest not to be arbitrarily displaced and the other interest to be protected.⁵¹⁵ Thus, the meaning of the arbitrariness is interpreted broadly by the HRC not only as unlawful or against the law, but also as unreasonable⁵¹⁶ or disproportionate in the circumstances of any given case.⁵¹⁷ In the context of arbitrary displacement, Principle 7 of the Guiding Principles provides insight into the criteria of necessity and proportionality. In order to meet the requirements of proportionality and necessity to justify interference with the right not to be arbitrarily displaced, states have an obligation to take all feasible alternatives, and displacement must be unavoidable and the only option available.⁵¹⁸ This clause implies the criterion of necessity, or else it can be read as meaning that displacement of population is necessary, and that without it the population will be in a serious danger. The requirement of proportionality is also given in Principle 7, which states that when there are no alternatives, states have the obligation to ensure that such displacements are affected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.⁵¹⁹

Furthermore, there is one area in which the Kampala Convention adds to the Guiding Principles: it regulates the obligation of armed groups and prohibits them from committing arbitrary displacement.⁵²⁰ Thus, the members of non-state groups have individual criminal responsibility for the act of arbitrary displacement. When we read this in conjunction with

⁵¹⁴ HRC General Comment 27, *supra* note 358, para.14 states that 'restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function'.

⁵¹⁵ Morel, M. (2014). 'The right not to be displaced in international law', *supra* note 28, p.294.

⁵¹⁶ According to the HRC, the requirement of reasonableness implies that the interference with a right must be proportional to the end sought and be necessary in the circumstances of any given case. see UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para.4; *Toonen v. Australia*, Communication No. 488/1992, Human Rights Committee, U.N. Doc CCPR/C/50/D/488/1992 (1994), para.8.3.

⁵¹⁷ Joseph, S. Schultz, J., Castan, M. (2000), 'The International Covenant on Civil and Political Rights', *supra* note 359, p.156.

⁵¹⁸ The Guiding Principles Principle 7 (1): 'Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether.'

⁵¹⁹ The Guiding Principles Principle 7 (2).

⁵²⁰ Kampala Convention Article 7(1)(a)

Article 3(1)(g), state parties also have a responsibility to protect persons from arbitrary displacement by non-state actors, and ensure the accountability of such non-state actors for acts of arbitrary displacement. As a matter of fact, the Kampala Convention itemises rules of behaviour for non-state armed actors and this does not seem to give a primary responsibility to refrain from arbitrary displacement to non-state actors because they cannot be party to the Convention. This state obligation arises from the obligation to protect, which includes protection from violations of human rights committed by not only state agents but also other third parties such as security companies, oil companies or paramilitary groups. Hence, the duty of states extends to the protection of populations from arbitrary displacement by holding accountable business enterprises such as oil companies and private military or security companies for any international crimes or violations of human rights.

At the preventive level, the HRC explained that the state must ensure the protection of freedom of movement from interference by both public and private actors.⁵²¹ Obviously, this approach is included in the Kampala Convention by providing protection from arbitrary displacement, because the protection against internal displacement covers not only instances where the state actively displaces its population, but also situations where the arbitrary displacement is a by-product of the actions of non-state actors. In other words, conflict between non-state actors is more likely to result in displacement even if it is not the intention of the parties to the conflict. So, the circumstances that indirectly result in displacement also give rise to state responsibility. Private companies and their security staff who are not public officials of the state are treated as 'non-state actor' under Article 1(n) of the Kampala Convention. Specific mention of multilateral companies, private security and military companies reflects the history of challenges that the African region that has been facing from the many companies involved in the exploration and exploitation of its economic and natural resources. This is especially relevant to the protection from arbitrary displacement of indigenous people, because they often suffer from displacement from their

⁵²¹ HRC General Comment 27, *supra* note 358, para.6.

traditional lands, which have rich mineral resources, and which have attracted extractive industry corporations.⁵²²

Indigenous people are the first group of people offered legal protection against displacement. Article 16 of ILO Convention No.169 is fully dedicated to the protection of indigenous people from displacement, and it includes both substantive and procedural obligations of states. The first basic principle, established in Article 16(1) of the ILO Convention, is that indigenous peoples shall not be removed from their lands. Then, some procedural requirements are listed in cases where displacement becomes unavoidable, such as free and prior informed consent, clear and accurate information on all the relevant facts, and full compensation for any loss or injury that the relocation may have caused.⁵²³ In other words, Article 16 gives rise to all types of state obligation by establishing the duty of states to refrain from displacement (obligation to respect), and also the duty of states to protect and fulfil by stipulating the requirement of appropriate procedures established by national legislation, i.e. public inquiries where indigenous peoples have the opportunity to effectively present their views and the right to receive full compensation for any loss of house or property.

While the relevant provision of the ILO Convention provides a detailed list of state obligations, it has a narrow scope of application, as it addresses only indigenous IDPs. In this sense, the content of the right not to be arbitrarily displaced in both the Guiding Principles and the Kampala Convention is broader, because indigenous people are one of the categories of people in need of special protection among other categories of IDPs. Guiding Principles Principle 9 and Kampala Convention Article 4(5) stipulate that states have the obligation to protect indigenous people and other groups with special attachment to, and dependency on their lands, from being displaced from these lands. The only permissible ground for the displacement is 'compelling and overriding public interest'.

⁵²² It has been stated from the representatives of indigenous peoples in the International Conference on Manila Declaration that: 'We (as indigenous people) have suffered disproportionately from the impact of extractive industries as our territories are home to over sixty percent of the world's most coveted mineral resources.' see The Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples (23-25 March 2009, Metro Manila, Philippines) available at: <http://www.forestpeoples.org/en/topics/extractive-industries/publication/2010/manila-declaration-international-conference-extractive>

⁵²³ see ILO Convention No.169 Article 16 (1),(2),(3),(4),(5).

As the explicit reference to indigenous people's right not to be arbitrarily displaced - therefore to Article 4 of the Kampala Convention - by the ACmHPR is yet to be made, some cases prior to the adoption of the Kampala Convention are useful in providing insight into state obligations in terms of indigenous people's protection against arbitrary displacement. In the case of *SERAC and CESR v. Nigeria*, the ACmHPR held that Nigeria had violated the right to life, the right to property and the right to a satisfactory environment for the development of the indigenous people of Ogoniland because the Nigerian government and a private oil company damaged their environment through the exploitation for oil.⁵²⁴ As a result of these violations of human rights, the Ogoniland people were displaced and were unable to return to their habitual residence. The ACmHPR found that the private oil company failed in its respective obligations, and the government of Nigeria should have stopped the destruction of the natural habitat and pollution of the environment of indigenous people of Ogoniland.⁵²⁵

When we consider this decision within the scope of indigenous people's right not to be arbitrarily displaced, as mentioned in the Kampala Convention, some key conclusions can be reached. First, it is clear that non-state actors (including companies) have the obligation to ensure that their acts do not lead to violations and this obligation arises from Article 3(1)(h) of the Kampala Convention, which stipulates the accountability of non-state actors involved in the exploration and exploitation of natural resources leading to displacement. Second, states have a general obligation to ensure respect for, and protection of the human rights of IDPs, to prevent arbitrary displacement under Article 3(1)(a)⁵²⁶ and Article 3(1)(d).⁵²⁷ Displacement of indigenous people will be considered non-arbitrary where it is carried out on the grounds of compelling and overriding public interest. Even if the Kampala Convention is not clear on whether there is some specific magnitude of public interest that is necessary and sufficient to permit displacement, it is assumed that prior to any decision requiring the displacement, states have an obligation to consider the requirement of proportionality and

⁵²⁴ The Social and Economic Rights Action Centre (SERAC) V. Nigeria, Communication No. 155/96, African Commission on Human and People's Rights

⁵²⁵ Ibid.

⁵²⁶ Kampala Convention Article 3(1)(a): 'State Parties shall refrain from, prohibit and prevent arbitrary displacement of populations'

⁵²⁷ Kampala Convention Article 3(1)(d): 'Respect and ensure respect and protection of human rights of internally displaced people, including humane treatment, non-discrimination, equality and equal protection of law'

necessity. These are the minimum procedural requirements highlighted both in the Kampala Convention and the Guiding Principles as ‘prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether.’⁵²⁸ For instance, according to the Kampala Convention, the state has a duty to devise an early warning system in areas of potential displacement.⁵²⁹ However, where alternatives to displacement are not feasible, another procedural due process, such as how law is implemented and enforced, can be considered as the strategy for minimising displacement and avoiding the adverse effect of displacement.⁵³⁰

These requirements can be found not only within the context of the right not to be arbitrarily displaced, but also within the scope of general obligations of states relating to protection from, during and after internal displacement. In this respect, the key steps that need to be considered to understand the arbitrariness of state acts⁵³¹ are the following: Prior to displacement, the requirement from states is being sufficiently informed about the reasons and procedures concerning any cause of displacement and getting the consent of IDPs. If displacement is unavoidable, states need to ensure the right of IDPs to receive protection and humanitarian aid, protection from acts of torture and discrimination, and provision of basic social amenities such as security, health care and shelter. After displacement, the state needs to ensure safe return of IDPs to their places, if it is not possible, state needs to ensure the right to effective remedies. These elements provide insights to decide whether there is a substantive sufficient justification for such a deprivation of a right or not. Indeed, due process requirements for determining whether arbitrary displacement has taken place are applicable in all displacement situations such as armed conflict, natural disasters and development projects. Even if the right not to be arbitrarily displaced includes some exceptional measures for allowing displacement, these measures need to meet the above-mentioned minimum procedural requirements. It can be

⁵²⁸ Principle 7(1) of the Guiding Principles and Article 4(2) Kampala Convention.

⁵²⁹ Conflict Early Warning and Response Mechanism (CEWARN) is a relevant example in avoiding adverse effects of displacement. CEWARN is designed to assess situations that could potentially lead to violence or conflicts and prevent escalation in African region, and hence prevent the displacement.

⁵³⁰ Adeola, R. (2016), ‘The right not to be arbitrarily displaced under the United Nations Guiding Principles on Internal Displacement’, *African Human Rights Law Journal* 83, p.94.

⁵³¹ Due process requirements can be clearly seen in Principles 7,10,11,12 and 23 of the Guiding Principles; also see Article 4 (obligations of states relating to protection from internal displacement) of Kampala Convention.

concluded that the right not to be arbitrarily displaced is sufficiently precise in order to create a number of specific rights and obligations that have been described in this section, and therefore meets this third criterion. Such conclusion again demonstrated how the right developed extensively at the international law level, but as the next section shows, criteria on whether a right is a free-standing one also need to account for the national level.

4.4.4. Human Rights should be compatible or at least not clearly incompatible with the general practice of states

The fourth criterion, which concerns the right's compatibility with state practices, allows this chapter's analysis to cover important development at the national level in order to examine how states respond to the development in international law described above. As identified above, the obligations imposed on states by the right not to be arbitrarily displaced clearly provide the precise content of this right. It is suggested that the identifiable obligations are closely related to the practicability of a human right. While these developments analysed above are critical for the wide recognition of the right not to be arbitrarily displaced, the fourth criterion analysed here is focused on the feasibility of the right not to be arbitrarily displaced and also its compatibility with the general practice of states. Since state practice is an important element of international law⁵³² and a crucial tool for interpreting treaties, it is also an important element for evaluating the recognition of the right not to be arbitrarily displaced and the state's compliance with its duties under the right.

Responsibility for protecting and assisting IDPs rests first and foremost with their national authorities; this is a core concept reflected in the Guiding Principles (Principle 3(1)), and the development of a national legal framework upholding the rights of IDPs is a particularly important reflection of this primary national responsibility.⁵³³ In other words, in order to solidify the right not to be arbitrarily displaced, the state's commitment to the adoption of

⁵³² The two essential elements of customary international law are state practice and *opinio juris*, as confirmed by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons*. see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports(1996), pp. 226 and 253, at <http://www.icj-cij.org/docket/files/95/7495.pdf>

⁵³³ Brookings-Bern Project on Internal Displacement (2005) , 'Addressing Internal Displacement: A Framework for National Responsibility', available at: <https://www.refworld.org/docid/4d357f4f2.html>, p.16.

Guiding Principles through national legislation plays a significant role, thereby explicitly recognising the right not to be arbitrarily displaced.

The launch of the Guiding Principles in 1998 was followed by the growing adoption of national instruments on IDPs, reflecting internal displacement as a global phenomenon. This reflection can be clearly seen in the 2005 World Summit Outcome, in which the Guiding Principles were unanimously recognised as ‘an important international framework for the protection of internally displaced persons’ and encourage heads of state and government to have the ‘resolve to take effective measures to increase the protection of internally displaced persons’.⁵³⁴ From the outset following the dissemination of the Guiding Principles, countries have developed national IDP laws, policies, plans, decrees and frameworks.

A closer look at the countries with national IDP laws and policies reveals how the Guiding Principles have been endorsed by the national authorities in their IDP protection. It must be mentioned that, within the scope of this study, the focus is only on the issues related to the prevention of arbitrary displacement.⁵³⁵

There are 19 IDP-protection laws developed between 1998 and 2019, after the adoption of the Guiding Principles, out of 26 laws applicable to situations of internal displacement.⁵³⁶ Prevention of forced displacement is one of the areas covered in these laws. Some countries even made explicit mention of the issues related to arbitrary displacement as ‘IDPs shall be protected against arbitrary eviction and/or displacement’.⁵³⁷ In contrast to the relatively small number of laws on IDPs, a total number of 60 national IDP policies have been adopted in 34 different countries, since the adoption of the Guiding Principles. Actually, when the Guiding Principles were adopted in 1998, the states’ concern was not the restatement of IDP rights in the Guiding Principles but rather the international involvement in the protection of IDPs, which was perceived by some countries as a cover for the interference of powerful countries in the affairs of weaker states, and therefore a threat to the state’s

⁵³⁴ Resolution adopted without vote by the General Assembly on 16 September 60/1. 2005 World Summit Outcome, A/RES/60/1

⁵³⁵ If all IDP-related issues such as return, rehabilitation, compensation of IDPs are included, this number would soar up to 448 document including national laws, policies, ongoing normative developments and frameworks. A detailed analysis of all kind of documents with IDP-related issues will be given in the next chapter.

⁵³⁶ Azerbaijan, Bosnia-Herzegovina, Colombia, Russian Federation, Peru, Croatia and Tajikistan have already developed law on IDP-related issues before 1998.

⁵³⁷ Countries which made explicit reference to protection against forced displacement are Georgia, Kenya, Colombia, Mexico and Peru.

sovereignty.⁵³⁸ As the concept of IDP protection falls within the domestic jurisdiction and sovereign competence of the state concerned, states have a tendency to exercise their powers without being held accountable to an outside authority. These concerns explain why states focus heavily on developing non-binding national IDP-policies rather than adopting binding IDP-laws. It appears that the preference for policy allows states to adjust expectations in the case of changing circumstances in this sovereignty-sensitive issue.

Among these policies, 41 of them have made clear that the prevention of internal displacement is one of the objectives of their national policy for addressing the internal displacement with a specific mention of the 'protection against arbitrary displacement'.⁵³⁹ In addition to that, there are some on-going normative developments⁵⁴⁰ yet to be completed and when these are complete, this will increase the number of documents that ensure the rights of IDPs.

Some countries provide a detailed definition of what is considered to be arbitrary displacement; and some even go further and have drafted bills⁵⁴¹ on criminalizing the acts of arbitrary displacement. For instance, Somalia's 2012 Puntland Policy provides the definition of arbitrary displacement, and highlights the conditions that are considered as arbitrary, and Zambia uses exactly the same wording as Principle 6 of the Guiding Principles, which deals with the IDPs' right not to be arbitrarily displaced in its 2013 Guidelines for the compensation and resettlement of IDPs. The government of Philippines adopted a national bill on internal displacement which imposes a penalty on those who directly commit the act

⁵³⁸ India, for example, asserted that the principles were not legally binding and that international action should be with the consent of the country concerned within the concept of the principle of state sovereignty. This is supported by China and Egypt. for further info see UNGA Press Release GA/SHC/3676,29 November 2001.

⁵³⁹ These policies are: Niger, Colombia(4), Kyrgyzstan, Mexico, Kenya(2), Peru(2), Zambia(2), Afghanistan(2), Nepal, Sudan(4), DRC, Somalia(3), Ethiopia, Georgia, Bosnia-Herzegovina, Sri Lanka, Uganda(2), Bangladesh, Iraq, Liberia, Yemen, Pakistan, Timor-Leste, Vanuatu, Burundi, Honduras(2) and Philippines.

⁵⁴⁰ There are 20 national instruments that yet to be enacted since they drafted. For instance, National Policy on the Prevention of Internal Displacement, Protection and Assistance to IDPs in Kenya in 2012. Following the ratification of the Kampala convention in June 2010, a study of the normative framework relating to the protection and assistance of internally displaced persons in Mali was conducted in 2016 and in May 2018, the Terms of Reference for the elaboration of a national legislative framework on internal displacement were developed. For the full list of countries with ongoing normative developments see <https://www.globalprotectioncluster.org/ongoing-normative-developments/>

⁵⁴¹ The Bill No.1142 'An Act Protecting the Rights of Internally and Penalizing the Acts of Arbitrary Internal Displacement' was presented to the Senate of the Philippines and is, since then, pending in the Committee (Senate of the Philippines 2016).

of arbitrary internal displacement.⁵⁴² The increasing number of IDP laws and policies which include preventive measures for forced/arbitrary displacement supports the compatibility of the right not to be arbitrarily displaced with the general practice of states because including the protection against arbitrary displacement in their national instruments also shows the state's intention to refrain from cases of arbitrary displacement. The examples of the recognition of the right not to be arbitrarily displaced at the domestic level are important steps to affirm and strengthen it.

Another reason for adopting the national IDP-policy would be to test the applicability of the IDP rights with a non-binding instrument in the first place and then take further steps. What is important here is that no state has ever explicitly challenged the recognition of the rights of IDPs, and in this way their right not to be arbitrarily displaced. Even if that right was implicit before the Guiding Principles, the issue was not the questioning of the existence of this right but rather, international involvement in the protection of IDP-rights. Indeed, international recognition of the rights of IDPs has contributed to altering state behaviour. As pointed out by one commentator, states refrain from public condemnation of cases of arbitrary evictions or forcible displacements.⁵⁴³ Hence, this situation obviously supports the compatibility of the right not to be displaced with the general practice of states. Indeed, a growing number of governments have been showing in the last two decades that they are ready to apply the Guiding Principles in a legal sense, meaning that some governments are in favour of a binding instrument on the protection of IDPs which is clearly reflected in the legally binding Kampala Convention.

Furthermore, when we look at the numbers of laws and policies by region, Africa is taking the lead in adopting IDP-policies, with 31 policies,⁵⁴⁴ and Europe is the first in the adoption

⁵⁴² See 2012 - Puntland Policy Guidelines on Displacement available at: <http://www.globalprotectioncluster.org/2018/07/27/somalia/>, also see 2013 - Guidelines for the compensation and resettlement of internally displaced persons available at: <http://www.globalprotectioncluster.org/2018/07/27/zambia/>; also see the Bill No.1142 "An Act Protecting The Rights of Internally and Penalizing the Acts of Arbitrary Internal Displacement" available at: <http://www.globalprotectioncluster.org/2018/07/27/philippines/>

⁵⁴³ Morel, M. (2014). 'The right not to be displaced in international law', *supra note* 28, p.239.

⁵⁴⁴ These countries are: Angola (2) , Burundi (3), Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo(3) ,Ethiopia, Kenya(2), Liberia, Mali (2), Nigeria (2), Sierra Leone, Somalia (6), South Sudan (2), Sudan, Uganda (2), Zambia (2).

of IDP-law, with 16 laws.⁵⁴⁵ Then, these are followed by the regions of Americas and Asia.⁵⁴⁶ The distribution of the adoption of national laws and policies on internal displacement by region shows how widely the protection of IDPs is recognised. Even though preventive measures differ from country to country because of different causes of displacement (i.e. in Asia prevention of arbitrary displacement mostly focuses on the natural disaster risk management but in Africa most policies focus on the conflict early warning mechanism for the prevention of arbitrary displacement), it can be argued that states' commitment to the protection of IDP-rights is a common goal for most governments. The conclusion of this section is that the right not to be arbitrarily displaced meets to a large extent the fourth criterion regarding compatibility with the general practice of states. The analysis here does recognise that when we account for 'general practice' that can entail variation in how states respond in terms of implicit or explicit recondition, and how advanced they may be in terms of implementation. Such variation will become fully evident in the detailed analysis of the national level that will be provided in Chapter 5.

4.4.5. Human Rights should be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations

The fifth criterion concerns the capacity of the right not to be arbitrarily displaced to be recognised as eligible to comprise an interpretation of obligations that derive from the UN Charter. The analysis here focuses on how the UN's key bodies refer to this right, implicitly or explicitly, in their resolutions while deliberating on state obligations towards protecting civilians' human rights. According to the UN Charter,⁵⁴⁷ one of the primary purposes of the UN is to 'achieve international co-operation in solving international problems of [...] a humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all [...]'.⁵⁴⁸ In addition to this obligation, Article 55 (c) of the Charter obliges member states to promote 'universal respect for, and observance of, human

⁵⁴⁵ These countries are: Azerbaijan (3), Bosnia and Herzegovina (7), Croatia, Georgia (2) , Russian Federation (2),Ukraine.

⁵⁴⁶ 6 laws and 13 policies on internal displacement adopted in Americas region and 2 laws and 16 policies adopted in Asia region.

⁵⁴⁷ Charter of the United Nations (UN Charter), adopted on 26 JUNE 1945, entered in force since 24 October 1945, 1 UNTS XVI.

⁵⁴⁸ Article 1(3) of the UN Charter.

rights and fundamental freedoms for all without distinction'. Respect for human rights and fundamental freedoms are relevant to the principle of universality, meaning that 'on the one hand, all authorities are to respect such rights, on the other hand all persons should benefit equally from the protection of human rights.'⁵⁴⁹ The inclusion of a provision on universal respect for, and observance of human rights is realised as a minimum standard for the protection of human rights.⁵⁵⁰ As observed previously, the right not to be arbitrarily displaced is consistent with the existing body of international human rights law. More specifically, the right not to be arbitrarily displaced, apart from being explicitly recognised in international soft law and regional hard law, is implicitly grounded in some well-established human rights such as the right to freedom of movement, the right to housing and the right to choose one's own residence, and their protection could strengthen the realisation of protection against arbitrary displacement because human rights reinforce each other, and are interrelated and interdependent as stated in the UNGA resolution 58/188.⁵⁵¹ Hence, being grounded in, and thus derived from, these well-established human rights can be considered one of the reasons why the recognition of the right not to be arbitrarily displaced can be considered as a human right. In following the Alston criteria for a right to be recognised as human right, another way of understanding the recognition of the right not to be arbitrarily displaced is to observe if this right is being mentioned by the UN bodies in resolutions from the UNGA and the UNSC. For several decades, resolutions of the UNGA and UNSC have played an increasingly important role in the human rights norm-creating process,⁵⁵² and the functions of the UNGA and the UNSC are the paramount framework for the achievement of the purposes of UN in the promotion and protection of human rights.⁵⁵³ In this respect, it is believed that these two UN bodies' approach to the recognition of the right not to be arbitrarily displaced in their resolutions is one of the key elements to understanding the current status of this right.

⁵⁴⁹ Simma B, Mosler, H, Randelzhofer A, Tomuschat C & Wolfrum R(2002), 'The Charter of the United Nations : a commentary' Second Edition, *Oxford University Press*, p.780. para.14.

⁵⁵⁰ Ibid. p.781. para.18.

⁵⁵¹ A/RES/58/188 (2004), p.2.

⁵⁵² In addition to the UNGA and UNSC resolutions, resolution by the UN Human Rights Council and General Comments by the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights have also made contribution to the norm-creating process under the UN system. For a detailed info see Meron, T. (1986), 'Human Rights Law-Making in the United Nations: A Critique of Instruments and Process', *Oxford: Clarendon Press; New York: Oxford University Press*.

⁵⁵³ A/RES/58/188 (2004), p.2.

The UNGA started to make reference to the Guiding Principles just a year after their adoption, welcomed the use of the Guiding Principles in UN agencies' work and encouraged their further dissemination and application.⁵⁵⁴ Since then, the UNGA has continued to make reference to the Guiding Principles and highlighted their importance in IDP protection. More specifically, UNGA's references to the Guiding Principles occurred in each resolution on IDPs with a wide range of IDP-related topics such as return and resettlement of IDPs, protection of and assistance to IDPs, rehabilitation of IDPs and finding a durable solution to IDP status.⁵⁵⁵ Over the 21-year period, it has been observed that the wording of the resolutions which made reference to the Guiding Principles after the year 2005 are much stronger than those adopted at the beginning of the 2000s. For instance, the resolutions on IDPs adopted between 1999 and 2005 mainly addressed the dissemination of the Guiding Principles among states, UN agencies and NGOs.⁵⁵⁶ Then, in the 2005 World Summit Document, the resolution went further and recognised the Guiding Principles as an important international framework for the protection of IDPs.⁵⁵⁷ Finally, most of the UNGA resolutions have gone even further, and recognised the Guiding Principles as 'the key international framework for the protection of IDPs'.⁵⁵⁸ The formal recognition of the Guiding Principles as a whole by the UNGA resolutions is important in terms of the recognition of the right not to be arbitrarily displaced because this shows states have no concern on the inclusion of the IDP's right not to be displaced in the Guiding Principles.⁵⁵⁹ On the contrary, state representatives made reference to the Guiding Principles in the UNGA meetings to support their argument for the responsibilities of states towards IDPs.⁵⁶⁰

In addition to that, there are some instances that clearly show the recognition of the right not to be displaced in UNGA resolutions. The first use of the term 'arbitrary displacement'

⁵⁵⁴ A/RES/54/167 (1999), 'Protection of and assistance to internally displaced persons', p.3. para.8.

⁵⁵⁵ For instance, see UNGA resolutions concerning the situation in Afghanistan, Bosnia-Herzegovina and Georgia.

⁵⁵⁶ see A/RES/54/167 (1999), A/RES/56/164 (2000), A/RES/58/117 (2003).

⁵⁵⁷ A/RES/60/1 (2005).

⁵⁵⁸ For instance, resolutions on the status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia.

⁵⁵⁹ There are in total 10 UNGA resolutions titled 'Protection of and Assistance to Internally Displaced Persons' have adopted since 1998 with a specific mention to the importance of the Guiding Principles as an international framework for the protection of IDPs and all of them passed without a vote.

⁵⁶⁰ For instance, in the 88th Plenary Meeting, the representative of Georgia expressed that the Guiding Principles call for adherence to three fundamental principles that are securing the rights of the displaced, including the right to a safe and dignified return and property rights. A/73/PV.88(2019).

appeared in the resolution on 'Human Rights and Mass Exoduses' in 1999, which encouraged states' compliance with provisions against the arbitrary displacement of refugees and IDPs.⁵⁶¹ In the following years, the UNGA's approach to IDP's protection from forced or arbitrary displacement has become much clearer since resolutions mention IDPs not in conjunction with refugees, but refer solely to IDP needs. The UNGA has issued 10 resolutions with the title of 'Protection of and Assistance to Internally Displaced People' during the 21-year period. First, the resolutions expressed the need to address the root causes of displacement in order to protect the human rights of IDPs.⁵⁶² So, in these resolutions the expression 'addressing the root causes of the displacement problem' shows the implied recognition of the right not to be arbitrarily displaced, as the scope of this right also includes the prevention of the root causes of displacement. Then, after 2005, the UNGA explicitly referred to the IDPs' right not to be arbitrarily displaced as 'persons who are internally displaced, without discrimination, have the right to freedom of movement and residence and should be protected against arbitrary displacement'.⁵⁶³ This reflects the UNGA's changing attitude to IDP issues and its tendency to address specifically the pre-phase of displacement, especially the right to be protected against arbitrary displacement.

Furthermore, the UNGA has implicitly recognised the existence of the right not to be arbitrarily displaced in two different thematic resolutions: one deals with assistance to refugees, returnees and displaced persons in Africa (20 resolutions in total between 1998 and 2019) and the other deals with the status of IDPs in Georgia (12 resolutions in total between 1998 and 2019). This implicit recognition is inferred from the phrases repetitively used in the resolutions as 'addressing the root causes of displacement', because the right not to be arbitrarily displaced specifically gives rise to the obligation to address the root causes of displacement and therefore primarily to provide protection in the pre-displacement phase. Therefore, this implicit recognition is understood in the resolutions concerning the IDP situation in Africa from the expression that states have responsibility to address the root causes of the displacement problem in order to provide protection for IDPs

⁵⁶¹ A/RES/54/180 (1999).

⁵⁶² A/RES/60/168 (2005), A/RES/58/117 (2003), A/RES/56/164(2001), A/RES/54/167 (1999).

⁵⁶³ 6 out of 10 resolutions titled with 'Protection of and Assistance to Internally Displaced People' have explicitly used the term IDPs' right not to be displaced and it seems more likely to be increased in the following UNGA meetings. These resolutions are: A/RES/72/182 (2017), A/RES/70/165 (2015), A/RES/68/180 (2013), A/RES/66/165 (2011), A/RES/64/162 (2009), A/RES/62/153 (2007).

and to prevent the increasing number of IDPs.⁵⁶⁴ The link between the better protection of IDP rights and addressing the root causes of displacement is noted in each of the 20 resolutions repeatedly. Another implicit recognition is inferred from the term used in the resolutions as ‘the prohibition of forced displacement because, as the previous chapter has explained in detail, prohibition of forced displacement in IHL provides the legal grounds of the prohibition from arbitrary displacement and the acts of forced displacement constitutes the arbitrary displacement of civilians. In this sense, it can be said that addressing the problems related to forced displacement is included in the content of the right not to be arbitrarily displaced, and thereby the right not to be arbitrarily displaced can be inferred from the expression in which the need to find solution to the practices of forced displacement. In the resolutions concerning the situation of IDPs in Georgia, this implicit recognition of the right to be protected against arbitrary displacement is understood from the statement which stresses the ‘urgent need to find a solution to the problems related to forced displacement and its prevention’ for the protection of IDP rights.⁵⁶⁵

Moving on to the UNSC resolutions, a different approach has been observed in the wording of the UNSC resolutions. Although, the UNSC did not address directly the prevention against arbitrary displacement, it has made the task of protection of civilians, including IDP-protection in all phases of displacement, one of the main mandates of UN peacekeeping operations.⁵⁶⁶ This can be seen in its country-specific decisions regarding UN Missions, such as the resolution on the situation in Somalia which emphasises the need to find a durable solution to forced displacement and the increasing number of IDPs,⁵⁶⁷ or the resolutions concerning the situation in the DRC, which emphasise that the acts of forced displacement undermine the peace, stability or security of the DRC⁵⁶⁸, and reaffirm the need to address the root causes of conflict in order to prevent forced displacement.⁵⁶⁹ The UNSC has also adopted thematic resolutions such as the ‘Protection of Civilians in Armed Conflict’, which

⁵⁶⁴ For instance, see A/RES/73/150 (2018), A/RES/72/152 (2017), A/RES/71/173 (2016), A/RES/69/154 (2014).

⁵⁶⁵ For instance, see A/RES/73/298 (2018), A/RES/72/280 (2017), A/RES/70/265 (2015), A/RES/67/268 (2012), A/RES/66/283 (2011).

⁵⁶⁶ One study reveals that in late 2009, eight UN peacekeeping missions were explicitly mandated to protect civilians including IDPs. for more info see Holt V & Taylor G (2009) ‘Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges’, *Office for the Coordination of Humanitarian Affairs (OCHA)*.

⁵⁶⁷ S/RES/2408 (2018)

⁵⁶⁸ S/RES/1807 (2008)

⁵⁶⁹ S/RES/2463 (2019)

reaffirms the prohibition of forced displacement in armed conflict⁵⁷⁰ and highlights the particular vulnerability of IDPs in conflict situations.⁵⁷¹ In its resolution on the situation in the Great Lakes region, the language of the UNSC resolution is more certain in addressing the root causes of internal displacement by establishing the link between forced internal displacement and instability and insecurity in the region. Therefore, it stresses the important role of UN missions in the relevant African countries and the AU Peace and Security Council in addressing the root causes of conflict, while expressing its concern at the instability in Africa because of the growing numbers of IDPs.⁵⁷² The UNSC's responsibility for the maintenance of international peace and security⁵⁷³ is strongly related to the stability and security of the country and region. The SC made it clear in its resolutions that the violation of human rights of civilians, including IDPs, as well as the growing number of IDPs can pose a threat to the stability and security of the country, therefore to international peace and security, and addressing the displacement at its roots is important for the prevention of this instability.⁵⁷⁴ Indeed, UN Charter obligations can be identified in country-specific resolutions within the context of the prevention of displacement in the following ways. First, the duty to cooperate (Article 1(3) of the UN Charter) by calling on all Member States to contribute to the UN humanitarian appeal for the relevant country to help ensure that United Nations humanitarian agencies and other international organizations are fully funded and able to address the protection and assistance needs of IDPs. Second, the obligation to respect human rights and fundamental freedoms (Article 55 (c) of the UN Charter) by stressing the primary responsibility for the governments to address the protection needs of IDPs from displacement. Finally, the duty to maintain international peace and security by authorising peace keeping operations under the Protection of Civilians task with a specific mention to the protection of IDPs under Chapter VII.⁵⁷⁵

Overall, resolutions adopted by the UNGA and the SC show that the right not to be arbitrarily displaced is recognised either implicitly or explicitly and the UN Charter

⁵⁷⁰ S/RES/1674(2006), S/RES/2417(2018)

⁵⁷¹ S/RES/1265 (1999)

⁵⁷² S/RES/2389 (2017)

⁵⁷³ UN Charter, *supra* note 453, Chapter VII (Articles 39-51).

⁵⁷⁴ For instance the SC express its deep concern regarding the very high number of internally displaced persons in the DRC and stresses the need address the root causes of conflict. Then it determines that the situation in the DRC continues to constitute a threat to international peace and security in the region. S/RES/2211 (2015)

⁵⁷⁵ The resolutions concerning the situations in Rwanda, Somalia, the DRC and Sierra Leone include these UN Charter obligations.

obligations of the member states in the protection from arbitrary displacement can be found in the terms of the resolutions and the acts of the SC under Chapter VII. It can be concluded that the right therefore meets to some extent the fifth criterion analysed in this section, especially when we consider that references of UN bodies to the right have gradually increased over time.

4.5. CONCLUSION

The chapter has focused on demonstrating the capacity of the right not to be arbitrarily displaced to gain a status as a free-standing human right. Initially, the chapter showed that demonstrating such capacity was integral to adopting a right-based approach to understanding the development of this right at the international and national level. Tackling displacement at its roots through a rights-based approach was seen as the way forward to promote the rights of IDPs.⁵⁷⁶ The advantage of the creation of human rights-based regimes for IDP protection from arbitrary displacement is that they clarify the duties of states and the rights of IDPs, improve protection from arbitrary displacement through the practice of states, international organisations and human rights bodies, and build an increased awareness amongst stake-holders of the human rights that are violated as a result of acts of arbitrary displacement. The rights to freedom of movement, to housing and to choose one's own residence are inevitably violated to a greater or lesser degree when arbitrary displacement occurs. The clarification of the scope of the human right not to be arbitrarily displaced leads to the reinforcement of the protection of these human rights.

The rights-based approach encompasses both the international and national level. While a temporary 'basic-needs' approach was pursued by international humanitarian organisations in responding to situations of forced displacement, a general understanding seems to emerge from both state and international organisations' (especially the UN) practices that arbitrary displacement should be treated as a human rights issue and should be addressed accordingly. The recognition of a human right not to be arbitrarily displaced can clearly be

⁵⁷⁶ Morel M, Stavropoulou, M. & Durieux, J.F. (2012), 'The history and status of the right not to be displaced', *supra* note 429, p.7; also Adeola is on the view that the recognition of the right not to be arbitrarily displaced as a novel creation of the Guiding Principles. see Adeola, R. (2016), 'The right not to be arbitrarily displaced under the united national guiding principles on internal displacement', *supra* note 530, p.84.

seen in the national IDP laws and policies of states that are addressing the pre-displacement phase, making specific provisions to prevent and avoid arbitrary displacement or to minimise the effect of unavoidable displacement. Over a 21 year-period, 60 national instruments have been included the phrase 'right not to be arbitrarily displaced' within the process of domesticating the Guiding Principles into their national laws and/or policies, and in the same period, the UNGA has made specific reference to 'protection from arbitrary displacement' in its resolutions, which shows how widely the right not to be arbitrarily displaced has been formally recognised, since the UNGA includes all member states of the UN. In addition to that, the practical examples of IDP protection and the acceptance of the need to address the root causes of internal displacement can be seen in the field by the UN peacekeeping operations that are launched with the authorisation of UNSC resolutions.

The Chapter also demonstrated that the right not to be arbitrarily displaced can be considered as a free-standing human right because it satisfied a number of key conditions that can be found on the Alston criteria. These include the need for a human right to reflect a fundamentally important social value, to be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, to be consistent with, but not merely repetitive of the existing body of international human rights law, to be compatible or at least not clearly incompatible with the general practice of states, and to be sufficiently precise as to give rise to identifiable rights and obligations. These five criteria focused on the level of international law but also covered the practices of states at the national level. It was concluded that the right not to be arbitrarily displaced largely meets these criteria, with some qualifications added in some of these criteria, especially criteria 4 and 5.

The analysis showed that criterion 3 was especially crucial in allowing the thesis to assess the precise content of the right not to be arbitrarily displaced, and how this creates specific rights and obligations, and also provides the meaning of arbitrary displacement as well as the conditions that can lead to arbitrary acts of displacement. When these conditions are identified, it then becomes possible to assess the states' duty to protect, respect and fulfil this right. In this context, if certain situations of arbitrary displacement are not covered by an exception clause (permissible grounds for internal displacement), it can then be argued that any interference with the right constitutes a human rights violation, and is therefore considered arbitrary and requires the state's responsibility to protect. Some differences

have been observed in the content of relevant articles of the instruments that dealt with the IDPs' right not to be arbitrarily displaced. For example, the Kampala Convention is not inclusive of a clear condition for assessing the arbitrariness of displacement as a result of development projects, something evident in the Guiding Principles and the Great Lakes IDP Protocol; however, it is the only instrument that regulates the obligations of armed groups for acts of arbitrary displacement and provides the individual criminal responsibility. The objective of these articles in these two conventions and the Guiding Principles is common, and that is the prevention of arbitrary displacement.

Overall, the larger the extent to which the particular rights, obligations and the conditions for lawful restriction under the right not to be arbitrarily displaced are identified in national instruments and/or UN resolutions, the more established the right can be considered to be. Increasing numbers of examples for the recognition of this right clearly reflect its establishment. However, beyond their content, this thesis argues that the international legal status of the right remains incomplete if national IDP laws and policies are not actually implemented. The review on how the right not to be arbitrarily displaced is implemented will be provided with case studies in the next chapter in order to examine the full extent to which the right is recognised and applied at the national level.

CHAPTER 5: DEVELOPING NATIONAL IDP LAWS AND POLICIES ON PROTECTION FROM ARBITRARY DISPLACEMENT: REFLECTIONS OF REALITY WITH CASE STUDIES

5.1. Introduction

The discussion in the previous chapter has examined the development of the right not to be arbitrarily displaced at the level of international law. It was shown that the development of the right was initiated by Principle 6 of the Guiding Principles, and was then determined by two key dimensions: first, the legal foundations of this right in IHL, ICL and IHRL, and, second, its capacity to reach the status of a free-standing human right by meeting a number of key criteria. The discussion in Chapter 4 also showed that national factors can also play a critical role in the development of this right. One possibility is for national frameworks to adopt international law frameworks and apply those at the domestic level and in this sense, the international level continues to drive the development of the right not to be arbitrarily displaced. There is a second possibility, however, that certain countries may explicitly recognise this right and take a number of additional steps towards the recognition and application of this right. In this case, such countries may be more advanced in developing this right when compared to how the same right develops at the international level. It is important to note that such advanced treatment of the right does not follow the same path; actually, states may adopt a different mix of legal and policy measures to attain the advanced development of this right. Despite such variation, all such national frameworks will collectively contribute to this right being developed substantially at the national level. Such analysis will be the focus of this chapter, where the development of the right at the national level will be provided through a detailed comparative analysis.

In examining the national level, this chapter first provides an overview of the significance of national frameworks for the development of this right, and then provides two major parts of analysis. Part-I first provides a discussion of the methods that have been used for the domestication of the Guiding Principles as a whole because such an approach helps delineate the general conditions surrounding the applicability of the right not to be arbitrarily displaced. To further understand how exactly prevention of arbitrary displacement is addressed across these categories, Part-I then conducts an additional

analysis of national IDP frameworks. This analysis will be provided with a table showing the different approaches taken by the states while promoting the recognition of the right not to be arbitrarily displaced in their national IDP frameworks. Using the Principles dealing with the prevention of arbitrary displacement (Principles 5-9) in the Guiding Principles as a departure for analysis, Part-II of this chapter examines governmental response to internal displacement in two countries most affected by internal displacement due to conflict, generalised violence and human rights violations: Colombia and Kenya. Apart from being countries most affected by the displacement issues, Colombia and Kenya have adopted national laws which incorporate the Guiding Principles and place a duty on these states to protect IDPs against arbitrary displacement.⁵⁷⁷

Colombia's law on IDPs is considered as a comprehensive law on internal displacement because it addresses all stages of displacement, from prevention of displacement to creating durable solutions for return, resettlement and reintegration. Kenya is one of the leading countries in Africa that have adopted a specific legal framework for the protection and assistance of IDPs, and which criminalises the arbitrary displacement of people. By bringing together legal analysis with two examples of domestic practice, the chapter aims to shed light on how, and to what extent, governments are fulfilling their responsibility to protect IDPs from arbitrary displacement. In so doing, this chapter contributes to research and understanding regarding the realisation of the emerging right not to be arbitrarily displaced at the national level.

5.2. The Significance of National Frameworks

Examining the national level is particularly important for rights of IDP populations that are confined within national borders throughout displacement. The simple fact that IDPs remain within the borders of their country means that it is their own government that bears primary responsibility for protecting and assisting them, as well as for safeguarding populations from arbitrary displacement in the first place. As set out in Principle 3 of the Guiding Principles, 'national authorities have the primary duty and responsibility to provide

⁵⁷⁷ see Republic of Colombia, Law No. 387 (1997); Kenya, Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act 56 (2012)

protection to internally displaced persons within their jurisdiction'. In addition to the Guiding Principles, the central role of national authorities in addressing internal displacement has been affirmed in UNGA and UN Human Rights Council resolutions and in regional legal instruments such as the Kampala Convention.

The development of a national legal framework upholding the rights of IDPs is considered part of the national responsibility of governments by the UNGA in its resolutions on 'Protection of and assistance to internally displaced persons'.⁵⁷⁸ The importance of developing domestic legislation and policies on internal displacement has also been stated in HRC resolutions as a tool to strengthen the protection of IDPs and to promote measures to prevent displacement.⁵⁷⁹ At the regional level, in the Great Lakes IDP Protocol, one of the objectives of that instrument is to 'provide a legal basis for the domestication of the Guiding Principles into national legislation by Member States',⁵⁸⁰ and this objective is reiterated in the preamble of the Kampala Convention. Moreover, the Council of Europe has called upon its member states to use the Guiding Principles as guidance on the protection of IDPs' rights and incorporate them into their domestic laws and policies.⁵⁸¹ This call for domestic incorporation was repeated on many occasions in the Council of Europe's Parliamentary Assembly Recommendations in the context of the domestic adoption of the Guiding Principles and implementation of them by European member states.⁵⁸² Finally, the Organisation of American States has urged member states to consider the Guiding Principles' domestic implementation.⁵⁸³ This substantial and widespread support for the development of a national instrument addressing displacement situations shows that the concept of national responsibility for IDPs is crucial for a state to better and more efficiently respond. This also shows that the concept of IDP protection is focused on the adoption of national IDP instruments for promoting the state's primary responsibility towards displaced populations, rather than this responsibility being imposed by an international instrument. To put it differently, having adopted national IDP-laws and/or policies is an important

⁵⁷⁸ For example, see U.N. Doc. A/58/393 (2003), p.9.

⁵⁷⁹ For example, see HRC Resolution 6/32 (2007), paras. 7(a) and (c), Commission on Human Rights U.N. Doc. E/CN.4/2003/86, para. 23.

⁵⁸⁰ Article 2(3) of the Great Lakes IDP Protocol

⁵⁸¹ Council of Europe, Committee of Ministers Recommendation 6 (2006) 'Internally Displace Persons'.

⁵⁸² Council of Europe, Parliamentary Assembly Recommendation 1862 (2009), para 6.4; Parliamentary Assembly Recommendation 1631 (2003), paras 14-15.

⁵⁸³ Organization of American States, General Assembly Resolution 2277 (2007), see also Organization of American States, General Assembly Resolution AG/RES 2417 (XXXVIII-O/08), (2008).

indication of a government's acknowledgement of the existence of the displacement problem on its territory and of its responsibility to address it. What is important here is to encourage states with high numbers of IDPs to adopt such IDP laws and policies.

Indeed, in response to the encouragement for the development of national legal framework, a total number of 448 instruments including national laws, policies, ongoing normative developments and frameworks dealing with the IDP-related issues such as return, rehabilitation, compensation of IDPs and prevention of arbitrary displacement have been adopted or are in the process of adoption.⁵⁸⁴ However, the process of developing such an instrument requires comprehensive appraisal of the displacement situation, as well as the challenges and the prospects for a durable solution. In order to assist governments in designing an effective national response and developing the steps needed to address problems of internal displacement, 'A Framework for National Responsibility'⁵⁸⁵ has been developed by one of the leading institutes in the field of internal displacement, Brookings Institution, that identifies twelve practical benchmarks for governments:

- '1. Prevent displacement and minimize its adverse effects.
2. Raise national awareness of the problem.
3. Collect data on the number and conditions of IDPs.
4. Support training on the rights of IDPs.
5. Create a legal framework for upholding the rights of IDPs.
6. Develop a national policy on internal displacement.
7. Designate an institutional focal point on IDPs.
8. Support national human rights institutions to integrate internal displacement into their work.
9. Ensure the participation of IDPs in decision-making.

⁵⁸⁴ The number of IDP-specific documents (448) represents all instruments that have been developed between 1998 and 2019.

⁵⁸⁵ Brookings-Bern Project on Internal Displacement (2005), 'Addressing Internal Displacement: A Framework for National Responsibility', *supra* note 533.

10. Support durable solutions.

11. Allocate adequate resources to the problem.

12. Cooperate with the international community when national capacity is insufficient'.⁵⁸⁶

As the main focus of this study is the protection from arbitrary displacement, three of the benchmarks are believed to be the most relevant in analysing government efforts to prevent displacement; namely, prevent displacement and minimize its adverse effects (Benchmark 1), create a legal framework for upholding the rights of IDPs (Benchmark 5), and develop a national policy on internal displacement (Benchmark 6); other benchmarks will be utilised where relevant.

Although there exists broad consensus on the normative principle of national responsibility, realising it often proves challenging in practice. Therefore, national responsibility must entail not only adopting such national legislation but also implementing it. We need to identify here the possibility that some countries will focus on an implicit recognition of the right not to be arbitrarily displaced, while others will aim for an explicit recognition. Both of these options have important implications of the implementation of this right, and, overall, its development at the national level. The next section will analyse both of these aspects.

⁵⁸⁶ see 'Addressing Internal Displacement: a Framework for National Responsibility' for a detailed discussion of each steps. Ibid.

5.3. PART-I: An Overview of National Approaches to the Prevention of Internal Displacement

5.3.1. Varieties in the development of national IDP laws and policies

When analysing national IDP frameworks, and their laws and policies, we can expect variation in how states adopt their own understandings in the development of the right not to be arbitrarily displaced. In all regions of the world, the adoption of legislation on internal displacement has proved valuable in defining IDPs, setting forth their rights, and establishing the obligations of governments towards them. The introduction of the Guiding Principles in 1998 and their widespread acceptance would appear to mark a significant turning point in the protection of IDPs. During the writing of this thesis, a total number of 448 national instruments were examined in 67 countries. An analysis of existing laws and policies reveals that there have been several methods used to develop national laws and policies on internal displacement. The most common method is to address a specific right or to cover a specific stage of displacement. The phase most addressed by the analysed national IDP-instruments is the post displacement phase, namely: voluntary return, reintegration and resettlement of IDPs. Some 157 national instruments, including laws, policies and ongoing normative developments address issues related to post-displacement phase adopted in 48 countries between 1998 and 2019.⁵⁸⁷ Provisions on protection of, and assistance to, IDPs are another area that addressed significantly in 96 instruments in 45 countries over the 21-year period.⁵⁸⁸ These instruments address- social welfare, education,

⁵⁸⁷ These countries are: Azerbaijan, Bosnia -Herzegovina, Croatia, Georgia, Mexico, Niger, Peru, Tajikistan, Ukraine, Afghanistan, Angola, Bangladesh, Burundi, DRC, Republic of Congo, Ethiopia, Guatemala, India, Indonesia, Colombia, Kenya, Iraq, Liberia, Mali, Montenegro, Nepal, Pakistan, Serbia, Sierra Leone, Somalia, South Sudan, Sri-Lanka, Sudan, Timor-Leste, Turkey, Uganda, Vanuatu, Yemen, Fiji, Zambia, Central African Republic, Nigeria, Philippines, Cambodia, Guinea Bissau, Mozambique, Namibia, Zimbabwe.

⁵⁸⁸ These countries are: Kyrgyzstan, Mexico, Russian Federation, USA, Gambia, Eritrea, Azerbaijan, Armenia, Bosnia -Herzegovina, Croatia, Georgia, Niger, Peru, Tajikistan, Ukraine, Afghanistan, Bangladesh, Burundi, DRC, Ethiopia, Guatemala, Colombia, Kenya, Iraq, Liberia, Mali, Montenegro, Nepal, Serbia, Sierra Leone, Somalia,

documentation, healthcare, food, security and housing matters related to protection and assistance needs of IDPs.

Another method used to develop national laws and policies on internal displacement is that addressing a specific cause of displacement. This method can be clearly seen particularly in the IDP-specific instrument's definition of who constitutes an IDP because IDP definition gives which causes of displacement are included. In some cases, the definition is limited to those who have been displaced as a result of conflict and/or generalised human rights violations, in others the definition includes only natural or human-made disasters. 23 countries explicitly endorse the IDP definition contained in the Guiding Principles, or closely reflect the Guiding Principles' IDP definition, which means that these countries decided to include all causes of displacement ranging from conflict and natural/man-made disasters to development projects⁵⁸⁹, and 24 countries provide a limited description of IDPs.⁵⁹⁰

The inclusion of a comprehensive definition covering all causes of displacement presents an opportunity for the better protection of the rights of IDPs. However, it seems that most governments only give priority to the most adversely affected IDPs, which also reflects each country's IDP profile. For instance, while in countries experiencing conflict such as Bosnia-Herzegovina, Serbia, Azerbaijan and Georgia, the IDP definition refers to those who have been forced to flee as a result of conflict, human rights violations and ethnic cleansing,⁵⁹¹ in the countries experiencing natural disasters, such as Fiji, Namibia, Gambia and Eritrea,⁵⁹²

South Sudan, Sri-Lanka, Sudan, Timor-Leste, Uganda, Vanuatu, Yemen, Zambia, Central African Republic, Nigeria, Philippines, Cambodia, Mozambique, Namibia, Zimbabwe.

⁵⁸⁹ These countries are: Kenya, Niger, Peru, Ukraine, Afghanistan, Angola, Bangladesh, Burundi, Ethiopia, Iraq, Nepal, Sierra Leone, Somalia, South Sudan, Sri Lanka, Sudan, Turkey, Uganda, Vanuatu, Yemen, Nigeria, Philippines, Zambia.

⁵⁹⁰ These countries are: Azerbaijan, Bosnia-Herzegovina, Colombia, Croatia, Georgia, Kyrgyzstan, Mexico, Peru, Russian Federation, Tajikistan, Armenia, Guatemala, India, Montenegro, Serbia, Sudan, Sri Lanka, Eritrea, Fiji, Gambia, Namibia, USA, Ukraine, Zambia.

⁵⁹¹ See *Azerbaijan: Law No. 669-1Q of 1999 "On Social Protection of Internally Displaced Persons and Persons Equated to Them"* [Azerbaijan], 21 May 1999, available at: <https://www.refworld.org/docid/4416d8054.html> [accessed 15 January 2020]; *Bosnia and Herzegovina: Law No. 01-286/2000 of 2000 on Displaced-Expelled Persons and Repatriates in the Federation of Bosnia and Herzegovina* [Bosnia and Herzegovina], 3 June 2000, available at: <https://www.refworld.org/docid/3ae6b5922.html> [accessed 15 January 2020]; National Legislative Bodies / National Authorities, *Kosovo: Strategy for Communities and Returns (2014 to 2018)*, December 2013, available at: <https://www.refworld.org/docid/5b4306654.html> [accessed 15 January 2020]; Georgia: Law of 2014 on Internally Displaced Persons – Persecuted from the Occupied Territories of Georgia [Georgia], 6 February 2014, available at: <https://www.refworld.org/docid/44ab85324.html> [accessed 15 January 2020]

⁵⁹² See National Legislative Bodies / National Authorities, Fiji: *Planned Relocation Guidelines - A framework to undertake climate change related relocation* (2018), December 2018, available at:

the IDP definition refers only to those who have been forced to flee as a result of natural-induced hazards. Another approach taken by some countries in terms of the IDP definition, is to include a limited time period or geographical limitation to the definition.⁵⁹³ For instance, Bosnia and Herzegovina's national instrument restricted the IDP definition with a limited time period, as IDPs are referred to as people who left their property in the territory of the Federation, in the period between 30 April 1991 and 4 April 1998.⁵⁹⁴ This simply reflects that the Bosnian government's acknowledgement of the existence of IDPs is limited to the period of war and upheaval during and after the disintegration of Yugoslavia. The same approach has been taken the government of Georgia by adopting State Strategy on IDPs, which is applicable between 2009 and 2012.⁵⁹⁵ Ukraine's national policy is an example of the geographic limitation to the definition; it defines IDPs as 'people displaced from temporarily occupied territory of Ukraine'.⁵⁹⁶ While all these given countries' first choice was to provide a limited definition of the term IDPs, in the following years they have progressively expanded the definition in their national instruments. This may reflect a process of persuasion which shifts the government's or key decision makers' views on the issue with the help of Special Rapporteur on the human rights of IDPs' country missions, and dissemination and application of the Guiding Principles within NGOs, humanitarian organisations and other governments. What can be problematic here is not to include an IDP definition in the national IDP frameworks at all, which is the case for some national instruments such as Sri Lanka's National Frameworks on IDP in 2002 and 2006 or Uganda's National Policy for Disaster Preparedness and Management in 2011. This can result in IDPs

<https://www.refworld.org/docid/5c3c92204.html> [accessed 15 January 2020] ; National Legislative Bodies / National Authorities, Gambia: National Disaster Management Bill (2008), 2008, available at: <https://www.refworld.org/docid/5b3df4064.html> [accessed 15 January 2020] ; National Legislative Bodies / National Authorities, Namibia: *National Disaster Risk Management Plan (2011)*, 2011, available at: <https://www.refworld.org/docid/5b3f69a47.html> [accessed 15 January 2020]; Eritrea: *Proclamation No. 145/2005 of 2005, Non-governmental Organization Administration Proclamation*, 11 May 2005, available at: <https://www.refworld.org/docid/493507c92.html> [accessed 15 January 2020]

⁵⁹³ Orchard, P. (2019) 'Protecting the Internally Displaced, *supra* note 77, p.225.

⁵⁹⁴ Bosnia and Herzegovina: Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of the FBiH 36/03) (2003), para.18.

⁵⁹⁵ Georgia: Decree No.575 "Regarding the amendment of the Government Decree No.403 of 28 May, 2009 about 'Adoption of the Action Plan for the Implementation of the State Strategy on IDPs during 2009-2012.

⁵⁹⁶ Ukraine: Resolution No.1094 "On Approval of the Comprehensive National Programme for Support, Social Adaptation and Reintegration of Citizens of Ukraine Internally Displaced from the Temporarily Occupied Territory of Ukraine and Anti-Terrorist Operation Conduct Area o Other Regions of Ukraine for the period until 2017" (and Action Plan)

becoming ‘lost among the other categories of displaced people’,⁵⁹⁷ such as refugees or irregular migrants. Therefore, there is a risk of failing to adequately address the specific needs of IDPs -if these national instruments do not specify what constitutes an IDP.

The third method examined in the laws and policies on internal displacement is a comprehensive instrument addressing all causes or stages of internal displacement such as Colombia and Kenya. These comprehensive national IDP frameworks outline institutional frameworks, roles and responsibilities for states in all phases of displacement, and set out measures to prevent, manage and mitigate displacement risks, as well as to protect and assist IDPs to find durable solutions. As these frameworks contain such detailed sections on how better and organised protection afforded to IDPs, they generally consist of long pages of explanations. However, Liberia took a different approach, and adopted a one-page IDP-specific policy which recognises all principles of the Guiding Principles and its IDP definition.⁵⁹⁸ Indeed, in terms of developing a comprehensive national IDP law or policy, Liberia’s IDP policy can be regarded as a comprehensive framework because it recognised the Guiding Principles as a source of ongoing guidance and reference for the protection of IDP rights. Thus, Liberia’s national policy acknowledges the adoption of all principles in the Guiding Principles. This means that Liberia recognises all the measures needed to be taken for all phases of displacement, its national responsibility to protect the rights of IDPs included in these 30 principles. This is a way to develop a comprehensive instrument on IDP protection. Wyndham argues that ‘a brief document adopting the Guiding Principles’ constitutes an additional category of models that have been developed as national instruments.⁵⁹⁹ However, it needs to be borne in mind that Liberia is the only country yet to have adopted a one-page national IDP instrument acknowledging all principles of the Guiding Principles. Although it is believed that such an approach can form a category in the meantime with an increasing number of examples. However, only one example on the different way to develop a national IDP instrument is not enough to reflect the country’s approach to the adoption of IDP-specific instruments in general yet. Having identified the three main methods of states towards the development of national IDP frameworks, the

⁵⁹⁷ Wyndham, J. (2006) ‘A Developing Trend: Laws and Policies on Internal Displacement.’, *supra* note 25, p.9.

⁵⁹⁸ Liberia: Instrument of Adoption of Guiding Principles on Internally Displaced Persons, 8 November 2004, available at: <https://www.refworld.org/docid/447c56244.html> [accessed 1 June 2020]

⁵⁹⁹ Wyndham, J. (2006), ‘A Developing Trend: Laws and Policies on Internal Displacement.’ *supra* note 25, p.10.

discussion will now turn to how states have addressed the prevention of arbitrary displacement, and how states have deployed the three methods to attain the recognition of the right not to be arbitrarily displaced.

5.3.2. The ways to address the Prevention of arbitrary displacement in adopted national IDP Instruments

The focus of this section is to identify all states that have developed national frameworks that endorse Principle 6 of the Guiding Principles and provide an overview of the types of law and policies included in such national frameworks. A closer look at national laws and policies reveals that 34 countries have addressed the pre-displacement phase with 60 national instruments including national strategies, ongoing developments, laws and policies. Efforts to prevent and mitigate the adverse effects of displacement varied in all these instruments depending on a country's exposure to natural disasters, existing tensions or political instability. It has been analysed that in these IDP-specific national instruments, governments address the pre-displacement phase with three main phrases, therefore grouped into three categories:

- Prevention of forced displacement/ forced eviction (especially in conflict situations)
- Disaster prevention and/or Early Warning System (especially in cases of natural disasters)
- Protection from/ Prohibition of Arbitrary Displacement (both in situations of conflict and natural disasters)

As indicated in the Principle 6 of the Guiding Principles, the content of the right not to be arbitrarily displaced covers protection from all causes of displacement and includes measures need to be taken to address the root causes of displacement. For this reason, any prevention measures in the analysed instruments are considered to be an indication of the recognition of the IDPs' right not to be arbitrarily displaced. In other words, this right is present in each national instrument dealing with any kind of prevention of displacement but not always addressed directly. For instance, two categories of national instruments promote the recognition of the right not to be arbitrarily displaced implicitly. These are the

instruments that include the phrases of ‘prevention of forced displacement’, ‘disaster prevention’, and/or ‘early warning systems’ without explicit reference to the right not to be arbitrarily displaced. Nevertheless, these phrases are considered as an indicator of the state’s recognition of the IDPs’ right not to be arbitrarily displaced because there are some elements that lead us to understand that the right not to be arbitrarily displaced has been recognised. These elements are (i) the acknowledgement of a state’s primary responsibility to prevent forced displacement and address the root causes of displacement, (ii) including paragraphs identifying the responsible institution for the protection of IDPs from forced displacement i.e. Ministry of Refugees and Internally Displaced Persons or Ministry of Displacement, (iii) outlining the institutional responsibility on how to take concrete steps to prevent further displacement, and (iv) relevant provisions establishing the early warning system to detect the condition that might lead to displacement of people (early warning system for either disaster prevention or conflict prevention). In the third category, 21 national IDP instruments specifically use the term ‘protection from arbitrary displacement’ and explicitly recognise the right not to be arbitrarily displaced. Some of them are even echoed the same wording that is used in the Guiding Principles Principle 6 for IDPs’ protection against arbitrary displacement.⁶⁰⁰

It has been observed that since the introduction of the Guiding Principles in 1998, states’ approach to the inclusion of the provisions on the prevention of arbitrary displacement has evolved gradually. Even though, addressing the root causes of displacement was often not on the top of a government’s agenda,⁶⁰¹ the inclusion of provisions on prevention of displacement has gained attention in the late 90s. This increasing awareness of the need to prevent internal displacement encourages government authorities to develop a coping mechanism with the causes of displacement. Therefore, promoting the legal recognition of the right not to be arbitrarily displaced and penalise arbitrary displacement in domestic law and focus on policies of disaster/conflict risk reduction and preparedness are the ways to address prevention in national IDP instruments. In this way, governments can take some concrete steps and these steps may allow for the anticipation of displacement. There are

⁶⁰⁰ The countries made explicit reference to the Guiding Principles Principle 6 are South Sudan, Iraq, Nigeria, Afghanistan and Philippines.

⁶⁰¹ This situation can clearly be observed in the comparison of numbers of countries and instruments dealing with post-displacement phases and pre-displacement phases given in this chapter.

also some national IDP legislations that pre-date the year the Guiding Principles were adopted,⁶⁰² among them Colombia has the only country that includes ‘prevention of forced displacement’ clause in its national framework. This instrument will be the focus of next section. In order to provide a better picture on which countries recognise the right not to be arbitrary displaced and how exactly the prevention of displacement is addressed, the table below shows the number of countries and the number of national documents that recognise the right not to be arbitrarily displaced.

⁶⁰² National IDP laws that pre-dates the Guiding Principles are Azerbaijan (1992), Bosnia-Herzegovina (1992), Croatia (1993), Georgia (1996), Russian Federation (1993 and 1995), Tajikistan (1994), Colombia (1997).

The list of States that have sought to address ‘prevention from internal displacement’ through national normative frameworks on IDPs

Pre-Displacement Phase (Prevention from Internal Displacement)			
	Prevention of forced displacement/ forced eviction*	Protection from Arbitrary Displacement**	Disaster prevention and/or Early Warning System***
1- Afghanistan (2)	2013-The National Policy on Internally Displaced Persons 2003- Afghanistan: IDP Strategy	2013-The National Policy on Internally Displaced Persons	2013-The National Policy on Internally Displaced Persons
2- Bangladesh (1)	–	2015- National Strategy on the Management of Disaster and Climate Induced Internal Displacement	2015- National Strategy on the Management of Disaster and Climate Induced Internal Displacement

* States promoting the need to address root causes of displacement and protection from arbitrary displacement with an implicit reference to the right not to be arbitrarily displaced

** States promoting legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right

*** States promoting protection from arbitrary displacement through early warning systems

NOTE: Countries in **bold** have additional provisions on the criminalisation of the acts of arbitrary displacement

The list of States that have sought to address ‘prevention from internal displacement’ through national normative frameworks on IDPs

3- Bosnia and Herzegovina (1)	2010 IDP Policy- Revised strategy of Bosnia and Herzegovina For the Implementation of Annex VII of the Dayton Peace Agreement	–	–
4- Burundi (1)	2001 – Protocol for the creation of a permanent framework for consultation on the protection of displaced persons		
5- Central African Republic (2)	–	2014-Roadmap for the Development of National Legislation on Internal Displacement 2015-National Policy on Protection and Assistance to Internally Displaced Persons in Central Africa	2015-National Policy on Protection and Assistance to Internally Displaced Persons in Central Africa

The list of States that have sought to address 'prevention from internal displacement' through national normative frameworks on IDPs

6- Colombia (8)	<p>1997- Law 387 on Internal Displacement of 1997</p> <p>2011-Victims and Land Restitution Law of 2011 (Law 1448)</p> <p>1995 - CONPES Document 2804: National Program of Integral Attention to the Population Displaced by Violence</p> <p>1998 - Decree No. 173 of 1998 by which the National Plan for the Comprehensive Care of the Population Displaced by Violence</p> <p>1999 - Strategic plan for managing internal displacement forced by the armed conflict</p> <p>1999 - Document CONPES 3057: Action plan for the prevention and care of forced displacement</p> <p>2005 - Decree No. 250 by which the National Plan for the Comprehensive Care of the Population Displaced by Violence</p> <p>2012 - Decree No. 1725 of 2012 by which the National</p>	Law 387 on Internal Displacement of 1997	<p>1997-Law 387 on Internal Displacement of 1997</p> <p>1999 - Document CONPES 3057: Action plan for the prevention and care of forced displacement</p>
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* States promoting the need to address root causes of displacement and protection from arbitrary displacement with an implicit reference to the right not to be arbitrarily displaced

** States promoting legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right

*** States promoting protection from arbitrary displacement through early warning systems

NOTE: Countries in **bold** have additional provisions on the criminalisation of the acts of arbitrary displacement

The list of States that have sought to address ‘prevention from internal displacement’ through national IDPs normative frameworks on

	Plan for Comprehensive Care and Reparation for Victims, dealt with by Law 1448 of 2011		
7- Democratic Republic of the Congo (1)	2016-Provincial Strategy for Sustainable Solutions for Internally Displaced Persons in North Kivu	–	–
8- Ethiopia (2)	1997-Proclamation no. 89/1997, Federal Rural Land Administration 2018-Humanitarian and Disaster Resilience Plan	–	2018-Humanitarian and Disaster Resilience Plan
9- Gambia (1)	2008- National Disaster Management Bill	-	-
10- Georgia (2)	2014-Law of 2014 on Internally Displaced Persons – Persecuted from the Occupied Territories of Georgia	2010-Decree of the Georgian Government No.575	–
11- Honduras (1)	2016-Law for the prevention, care and protection of internally displaced persons	–	–
12- Iraq (1)	–	2008-National Policy on Displacement (specific reference to the Principle 6 of the Guiding Principles)	–
13- Kenya (5)	2009-National Disaster Response Plan 2009-Eviction and Resettlement Guidelines	2011- National policy on the prevention of internal displacement and the protection	2011- National policy on the prevention of internal displacement

* States promoting the need to address root causes of displacement and protection from arbitrary displacement with an implicit reference to the right not to be arbitrarily displaced

** States promoting legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right

*** States promoting protection from arbitrary displacement through early warning systems

NOTE: Countries in **bold** have additional provisions on the criminalisation of the acts of arbitrary displacement

The list of States that have sought to address ‘prevention from internal displacement’ through national IDPs normative frameworks on

	2012-Evictions and Resettlement Procedures Bill	and assistance to internally displaced persons in Kenya 2012-The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (specific reference to the Principle 6 of the Guiding Principles)	and the protection and assistance to internally displaced persons in Kenya 2012-The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act
14- Kyrgyzstan (1)	2002-Law No.133 on Internal Migration	-	-
15- Malawi (1)	2015- National Disaster Risk Management Policy	—	2015- National Disaster Risk Management Policy
16- Mexico (2)	2014-Law for the Prevention of and Response to Internal Displacement in the State of Guerrero, Decree No. 487 2012-Law for the Prevention of and Response to Internal Displacement in the State of Chiapas, Decree N. 158	—	—
17- Namibia (1)	2011- National Disaster Risk Management Plan	-	2011- National Disaster Risk Management Plan
18- Nepal (1)	2007-National Policies on Internally Displaced Persons	-	-
19- Niger (1)	—	2018-Bill on the Protection and Assistance to	—

* States promoting the need to address root causes of displacement and protection from arbitrary displacement with an implicit reference to the right not to be arbitrarily displaced

** States promoting legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right

*** States promoting protection from arbitrary displacement through early warning systems

NOTE: Countries in **bold** have additional provisions on the criminalisation of the acts of arbitrary displacement

The list of States that have sought to address ‘prevention from internal displacement’ through national IDPs normative frameworks on

		Internally Displaced Persons in Niger	
20- Nigeria (3)	2016- The Buhari Plan	2012-National Policy on Internally Displaced Persons (specific reference to the Principle 6 of the Guiding Principles) 2016-Rights of Internally Displaced Persons (IDPs) Bill (specific reference to the Principle 6 of the Guiding Principles)	2012-National Policy on Internally Displaced Persons 2016-Rights of Internally Displaced Persons (IDPs) Bill 2016- The Buhari Plan
21- Pakistan (1)	2013- National Disaster Risk Reduction Policy	–	2013- National Disaster Risk Reduction Policy
22- Peru (1)	-	2014- Law No. 28223 on Internal Displacement	-
23- Philippines (2)	2010- Act No.101211, Disaster Risk Reduction and Management	2014-Rights of Internally Displaced Persons Act, Senate Bill No.1142	2010- Act No.101211, Disaster Risk Reduction and Management
24- Sierra Leone (1)	2006- Disaster Management Policy	-	2006- Disaster Management Policy
25- Somalia (4)	2019- Banadir Regional Administration & Municipality of Mogadishu: Internally Displaced Person & Refugee	2012- Puntland Policy Guidelines on Displacement	2019- Banadir Regional Administration & Municipality of

* States promoting the need to address root causes of displacement and protection from arbitrary displacement with an implicit reference to the right not to be arbitrarily displaced

** States promoting legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right

*** States promoting protection from arbitrary displacement through early warning systems

NOTE: Countries in **bold** have additional provisions on the criminalisation of the acts of arbitrary displacement

The list of States that have sought to address ‘prevention from internal displacement’ through national IDPs normative frameworks on

	Returnees Policy	2015-Somaliland Internal Displacement Policy 2019-National Policy on Refugee-Returnees and internally Displaced Persons	Mogadishu: Internally Displaced Person & Refugee Returnees Policy
26- South Sudan (1)	–	2019-Protection and Assistance to Internally Displaced Persons Act (specific reference to the Principle 6 of the Guiding Principles)	2019-Protection and Assistance to Internally Displaced Persons Act
27- Sri-Lanka (3)	2006-Guidelines on Confidence Building and Stabilisation Measures for IDPs in the North and East of Sri Lanka 2011-National Action Plan for the Protection and Promotion of Human Rights	2016-National Policy Framework on Durable Solutions	–
28- Sudan (3)	2006-Eastern States Peace Agreement of 2006 2009-National Policy for Internally Displaced Persons 2012-Doha Document for Peace in Darfur	–	–
29- Timor Leste (1)	2008-National Disaster Risk Management Policy	–	2008-National Disaster Risk Management Policy
30- Uganda (2)	2013-National Land Policy	2004-National Policy for Internally Displaced	2004-National Policy for Internally

* States promoting the need to address root causes of displacement and protection from arbitrary displacement with an implicit reference to the right not to be arbitrarily displaced

** States promoting legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right

*** States promoting protection from arbitrary displacement through early warning systems

NOTE: Countries in **bold** have additional provisions on the criminalisation of the acts of arbitrary displacement

The list of States that have sought to address ‘prevention from internal displacement’ through national IDPs normative frameworks on

		Persons	Displaced Persons
31- Ukraine (1)	2014-Law No. 1706-VII, on Ensuring Rights and Freedoms of Internally Displaced Persons	–	–
32- Vanuatu (1)	2018-National Policy on Climate Change and Disaster-Induced Displacement	–	2018-National Policy on Climate Change and Disaster-Induced Displacement
33- Yemen (1)	2013-National Policy for Addressing Internal Displacement in the Republic of Yemen	–	2013-National Policy for Addressing Internal Displacement in the Republic of Yemen
34- Zambia (2)	–	2013-Guidelines for the Compensation and Resettlement of Internally Displaced Persons 2015- National Resettlement Policy	2013-Guidelines for the Compensation and Resettlement of Internally Displaced Persons

* States promoting the need to address root causes of displacement and protection from arbitrary displacement with an implicit reference to the right not to be arbitrarily displaced

** States promoting legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right

*** States promoting protection from arbitrary displacement through early warning systems

NOTE: Countries in **bold** have additional provisions on the criminalisation of the acts of arbitrary displacement

Three conclusions can be drawn from this table:

1-States have given gradually increasing attention to the recognition of the right not to be arbitrarily displaced. This gradual recognition can be seen with three steps: Firstly, protection from arbitrary displacement is addressed especially in those countries that identify conflict and/or violence as a cause of internal displacement, such as Bosnia-Herzegovina, Colombia, Georgia and Ukraine. In these national instruments, ‘prevention of forced eviction of persons in need’, ‘prevention of the causes that produce forced displacement by violence’ and ‘protection from forced displacement from his/her permanent place of residence’ are commonly used phrases that indirectly refer to the IDPs’ right not to be arbitrarily displaced. Secondly, it is observed that the content of protection from arbitrary displacement has been expanded in national IDP instruments to include causes of natural disasters, in countries including Gambia, Malawi, Namibia, Sudan, Timor-Leste and Kenya, with the phrase ‘prevention of displacement caused by natural disasters’, ‘prevention of disaster or the mitigation of its effects on displaced population’ and ‘to develop an integrated and effective warning system’ because every disaster incident results in internal displacement of affected populations. Finally, the explicit mention to ‘right not to be arbitrarily displaced’ has started to be used in national instruments, including those of Afghanistan, Philippines, Iraq, Kenya, South Sudan, Sri Lanka and Somalia.

2- Once states started to make explicit references to the right not to be arbitrarily displaced in their national instruments, they took two different ways to show their recognition and therefore protection of this right: either with a one-line expression acknowledging state’s responsibility on the ‘protection of IDPs from arbitrary eviction or displacement’, or with an entire section that is devoted to the meaning and content of the ‘arbitrary displacement’. Some examples of the former category are as follows. Bangladesh recognises the prohibition of arbitrary displacement of people from their home or place of habitual residence in its national policy.⁶⁰³ Moreover, Sri Lanka recognises the right not to be arbitrarily displaced in its national policy: ‘every person shall have the right to be protected from forced and/or arbitrary displacement as a result of acts caused by either State itself or

⁶⁰³ National Legislative Bodies / National Authorities, Bangladesh: National Strategy on the Management of Disaster and Climate Induced Internal Displacement (2015), September 2015, available at: <https://www.refworld.org/docid/5b2b99f74.html> [accessed 08 January 2020], para. 1.3.20

non-state actors, or as a result of omission or failure to act'.⁶⁰⁴ So, the state's responsibility to protect its IDPs from acts of arbitrary displacement in situations in which the state is either unwilling or unable to provide protection has been made clear in Sri Lanka's national policy. Some countries have opted to recognise the right not to be arbitrarily displaced in a more detailed way and this constitutes the latter category of states. These examples are seen in national instruments of Kenya, Somalia, South Sudan, Central African Republic, Afghanistan and Nigeria. These instruments include a definition of arbitrary displacement and then affirm that the displaced population has a right not to be arbitrarily displaced; and finally they provide a non-exhaustive list of acts which are considered arbitrary and also provide permissible grounds for displacement, such as military exigencies or compelling and overriding public interests. This approach obviously reflects the content of the Principle 6 of the Guiding Principles. Indeed, South Sudan, Iraq, Afghanistan and Nigeria have made explicit reference to the Principle 6 of the Guiding Principles in their national IDP instruments with an entire section dealing solely with the protection from arbitrary displacement.

3- Some countries have taken the right not to be arbitrarily displaced even further by criminalising acts of arbitrary displacement, as in the case of the Philippines, Iraq and Kenya. For instance, in its Ministry Order, the government of Iraq affirmed the criminalisation of acts of displacement as 'anyone who occupies a house belong to a displaced person will be considered as a participant in this displacement'.⁶⁰⁵ Furthermore, Kenya's national policy includes a section on holding accountable individuals responsible for arbitrary displacement as 'the government systematically investigates, prosecutes and punishes crimes under the Penal Code and other relevant laws of Kenya committed or instigated by those responsible for arbitrary displacement.'⁶⁰⁶ Among these countries, the Philippines has the most detailed national instrument dealing with the criminalisation of the acts of arbitrary displacement,

⁶⁰⁴ National Legislative Bodies / National Authorities, Sri Lanka: National Policy Framework on Durable Solutions, 2016, August 2016, available at: <https://www.refworld.org/docid/5a842e5e4.html> [accessed 08 January 2020], section V. Rights and Entitlements of the Displaced, para.1.1.

⁶⁰⁵ National Legislative Bodies / National Authorities, Iraq: Prime Minister's Order 101/S of 2008 (property), 3 August 2008, available at: <https://www.refworld.org/docid/49da18482.html> [accessed 08 January 2020], para.1.

⁶⁰⁶ National Authorities, Kenya: National policy on the prevention of internal displacement and the protection and assistance to internally displaced persons in Kenya, 2011, 1 August 2011, available at: <https://www.refworld.org/docid/5a8412554.html> [accessed 08 January 2020], section 5.3 Accountability, Criminalization and Addressing Impunity for Acts of Arbitrary Displacement, para.52.

with legislation entitled ‘An Act Protecting the Rights of Internally Displaced Persons and Penalizing the Acts of Arbitrary Internal Displacement’, which is clearly inspired by Principle 6 of the Guiding Principles, as it uses the same wording while describing the impermissible grounds of arbitrary acts of displacement.⁶⁰⁷ However, Kenya’s IDP Policy and the Philippines’s IDP Act have yet to enter into force; once entered into force, these instruments will strengthen the effective implementation of the frameworks on the prohibition against arbitrary displacement.

These examples show that for an increasing number of states, there is no longer a question of whether governments should be recognising the IDPs’ right not to be arbitrarily displaced. What is considered instead is how this right should be protected, and what is the criminal responsibility in case of violation. The creation of a national policy and law, including the protection from arbitrary displacement and the criminalisation of acts of arbitrary displacement, is a definite positive step forward that many states have taken. In such national frameworks, the recognition of the right not to be arbitrarily displaced has been realised through implicit and explicit reference, and the focus now shifts to developing a mix of laws and policies that helps to implement this right. The following section focuses on analysing the types of national frameworks that states adopt.

5.3.3. Strengthening the Prevention of Arbitrary Displacement with Different Formats of Instruments

Following from the section above, it is important to consider what do the different forms of national IDP instruments tell us on a state’s approach to the protection of the right not to be arbitrarily displaced. Existing national instruments vary greatly depending on the country’s legal system, culture and particularities of each displacement situation. Naturally, there is a broad variety with respect to their content, format and scope. Among the all adopted 448 national IDP-instruments, 26 of them are IDP-laws, 60 of them IDP-policies.⁶⁰⁸

⁶⁰⁷ National Legislative Bodies / National Authorities, Philippines: Rights of Internally Displaced Persons Act, Senate Bill No.1142 (2014), 16 September 2014, available at: <https://www.refworld.org/docid/5b42f5974.html> [accessed 08 January 2020], Section 7.

⁶⁰⁸ Other IDP-related national instruments are either pending for an adoption which means those are to be a law/policy after the adoption or other relevant instrument related to the guarantee of IDPs’ rights, but which

One of the main reasons for the high number of policies and other formats of instruments i.e. plan of action, strategy on internal displacement compared to national IDP-laws is that they can be adopted with less formal procedures and therefore often more rapidly than legally binding instruments. If some displacement situations require a more rapid solution such policies, plan of actions or strategies may be more appropriate to ensure the protection of IDPs. It is also possible that in some internal displacement cases, the law itself may not provide a sufficient basis for addressing the needs of IDPs.⁶⁰⁹ For instance, a national policy or plan of action on internal displacement can be complementary to an IDP-law by spelling out national and local institutional responsibilities for responding to internal displacement, indicating the roles and responsibilities of different government departments, as well as identifying a mechanism for coordination among them.⁶¹⁰ To put it differently, on the one hand national IDP laws frequently state general principles, entitlements of IDPs and obligations of the state regarding the cause of displacement. On the other hand, plans of action, strategies and policies are drafted for the purpose of being more specific to the situation of internal displacement by allocating roles and responsibilities of different government departments and identifying actions to address particular challenges in the national response, such as what kind of budget allocations are possible to address such challenges.⁶¹¹ They therefore can be used to elaborate and implement legislation. For instance, as a complementary instrument to its existing national IDP Law,⁶¹² Georgia's Strategy on IDPs was adopted in 2007.⁶¹³ The strategy calls for review of existing legislation to identify and address obstacles to integration of IDPs⁶¹⁴, designates the Ministry of

do not provide a general framework and/or not specifically addressing internal displacement but includes one of the following terms: IDP, displacement, IDPs' resettlement and relocation and prevention of forced/arbitrary displacement. For the full list of other relevant instruments on internal displacement see <http://www.globalprotectioncluster.org/other-relevant-instruments/> [accessed 09 January 2020].

⁶⁰⁹ Brookings Institution (2008), 'Protecting Internally Displaced Persons: A Manual for Law and Policymakers', *University of Bern Project on Internal Displacement*, pp.26-28.

⁶¹⁰ Brookings Institution (2005), 'Addressing Internal Displacement: A Framework for National Responsibilities', *supra* note 533, p.17.

⁶¹¹ For a detailed discussion on the content of national policy, strategy, or plan of action, see Brookings Institution (2008), 'Protecting Internally Displaced Persons: A Manual for Law and Policymakers', *supra* note 609, pp. 28-29; also see Schrepfer N. (2012), 'Addressing Internal Displacement through National Laws and Policies: A Plea for a Promising Means of Protection', *supra* note 25, p.684.

⁶¹² Law of the Republic of Georgia Concerning Internally Displaced People, 28 June 1996. Repealed by: the Law of 2014 on Internally Displaced Persons – Persecuted from the Occupied Territories of Georgia [Georgia], 6 February 2014.

⁶¹³ Georgia: Decree No. 47 on "Approving of the State Strategy for Internally Displaced Persons - Persecuted", February 2007.

⁶¹⁴ *Ibid.* Chapter V, para. 1.

Refugees and Accommodations as the leading coordination body with regard to other governmental institutions, international donors, civil society, and IDPs,⁶¹⁵ and calls for the adoption of an action plan to secure adequate resources for the strategy's implementation, allocate functions among those involved, prioritise activities, and set out indicators for monitoring.⁶¹⁶ Another example can be observed in Uganda's national policy. As a guide to better implementation of the law that will potentially enter into force later, this policy contains an institutional part outlining the responsibilities of national authorities in line with their obligations, and establishes a mechanism for coordination of response to internal displacement with an entire chapter dedicated to 'Institutional Arrangements, Roles and Responsibilities'.⁶¹⁷ These instruments provide a useful example of how to promote effective implementation.

However, one more point needs to be highlighted: the decision for the development of a national instrument including provisions on addressing internal displacement might be influenced by the prevailing political opportunities at the time of the development of the instruments,⁶¹⁸ i.e. in the election process, as citizens of their own country, the right of IDPs to participate in elections can be used by the government and/or the opposition parties to get the votes of this displaced population by developing a national instrument regarding their protection and assistance or in the post-conflict period, especially in the ceasefire agreement, governments/ parties to the conflict may be imposed to include a clause for the protection and assistance of IDPs by international actors with no plan to follow-through on implementation. In these situations, beyond the strong commitment for the protection of, and assistance to, IDPs on paper, there is the question of whether these policies or laws are actually implemented. Otherwise, this would remain merely the government's strategic rhetorical commitment to the norms embodied in the Guiding Principles, with no plan to follow-through on implementation.⁶¹⁹ For instance, the Dayton Peace Agreement⁶²⁰ is one of the first ceasefire agreements that is signed with the involvement of international actors

⁶¹⁵ Ibid. Chapter VII, paras. 1 and 3.

⁶¹⁶ Ibid. Chapter VII, para. 2.

⁶¹⁷ Uganda: National Policy for Internally Displaced Persons, 2004, 1 August 2004, Chapter 2.

⁶¹⁸ Schrepfer also argues that developing different formats very much influenced by national legal and political traditions. See Schrepfer N. (2012), 'Addressing Internal Displacement through National Laws and Policies: A Plea for a Promising Means of Protection, *supra* note 25.

⁶¹⁹ Orchard, P. (2019) 'Protecting the Internally Displaced, *supra* note 77, p.138.

⁶²⁰ Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995.

such as the Organization for Security and Co-operation in Europe and the United Nations Protection Force to address IDP issues. Annex 7 to the Agreement was designed to be key to the future stability of the region, as it recognised the right of all displaced people to return to their homes of origin, or to receive compensation for property to which, for whatever reason, they could not return. However, after 25 years, durable solutions for IDP resettlement and reintegration are yet to be achieved.⁶²¹

As indicated in the aforementioned twelve benchmarks, IDPs' participation in the decision-making process⁶²² significantly lowers the risk of the resulting instruments being merely symbolic. In the context of protection from arbitrary displacement, while consultation should recognise the basic human right not be displaced on arbitrary grounds, it also makes good sense on a practical level. When affected persons understand why displacement is necessary and are involved in decisions about relocation sites and modalities, they are less likely to resist the move and more likely to offer suggestions to facilitate relocation.⁶²³

Overall, while there are some limitations to the scope of national laws and policies, developing a national instrument on internal displacement is definitely a positive step forward towards the recognition of IDP rights or the existence of displacement situations within the boundaries of a state, and raises awareness of the need to respond to the plight of IDPs. In this respect, the next section goes beyond the identification of different forms and approaches of developing national IDP instruments, and examines whether they are effectively implemented, especially in the context of protection from arbitrary displacement, looking at the practice of Colombia and Kenya. In this respect, the next part will examine the extent to which certain states may develop national frameworks in terms of recognition and implementation of the right not to be arbitrarily displaced that may actually be more advanced in addressing the prevention of internal displacement than what is provided in the level of international law.

⁶²¹ For further discussion and analysis on the plight of Bosnian IDPs, see Forced Migration Review (2015), 'Dayton +20: Bosnia and Herzegovina twenty years on from the Dayton Peace Agreement' Issue 50.

⁶²² Brookings Institution (2005), 'Addressing Internal Displacement: A Framework for National Responsibilities', *supra* note 533, Benchmark 9.

⁶²³ Brookings Institution (2008), 'Protecting Internally Displaced Persons: A Manual for Law and Policymakers', *supra* note 609, p.34.

5.4. Part-II: Reflection of the Implementation with Case Studies

In the light of the information given in the first part of analysis, the second part will examine the states that follow (i) the most comprehensive method, and (ii) promote legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right. The chapter will show how such states comprise the ideal category to identify the extent of the applicability and scope of this right. For this purpose, the chapter will move to analyse two case studies, Colombia and Kenya. To examine the extent of applicability of this right within these two cases, the chapter will look at the capacity of these countries' national IDP legislations. Specifically, it enquires whether these legislations can, first, create a legal framework upholding the rights of IDPs, second, take positive steps to prevent and minimise the adverse effects of displacement, and, third, develop a national policy on internal displacement in order to raise institutional awareness. In each country, each of these three benchmarks can become the dominant legal process in determining the evolution of the right not to be arbitrarily displaced, and its applicability with regards to state responsibilities. However, it should be noted that two countries have their own specific dynamics to understand the applicability of the right not to be arbitrarily displaced. For Colombia, this dynamic is driven by the Colombian Constitutional Court's (hereafter the Constitutional Court) decisions on the protection of IDPs. For Kenya, this dynamic is shaped by the development of an IDP Policy which includes a broad range of responsibilities for the prevention of displacement in a very detailed way. Indeed, Kenya's law is still in the early stages of implementation and there is no evidence yet of Constitutional Court decision. For this reason, while the focus will be the Constitutional Court's contribution to the scope and applicability of the right not to be arbitrarily displaced in Colombia, comparative analysis of Kenya's National IDP law and IDP Policy will be the focus in Kenya's case.

5.4.1. The case of Colombia

Colombia's IDP legislation is considered one of the most comprehensive and progressive attempts to implement the Guiding Principles, as it addresses all phases of displacement and allocates institutional responsibility for the protection of IDP rights. Colombia's advanced legal regime on the protection of IDP-rights is largely modelled on the Guiding

Principles,⁶²⁴ which were developed at the same time. The framework for IDP-related policies is first provided by Law 387 of 1997;⁶²⁵ this law has been developed through various statutory decrees such as Decree 2569 of 2000, which partially regulated Law 387 of 1997 with the goal of specifying the responsibilities of some of the entities charged with assisting the displaced population, Decree 2131 of 2003 regarding the health care of the population displaced by violence and Decree 250 of 2005 regarding comprehensive assistance for the population displaced by violence.⁶²⁶ Furthermore, Colombia is not only a country with some of the most comprehensive national IDP legislation, but also the state with the most important contributions by the judiciary to the protection of IDPs, with the Constitutional Court decisions on the protection of the IDPs' rights. Especially, the Constitutional Court's decision T-025 of 2004 has particular importance, as it relied heavily on the Guiding Principles; the Constitutional Court used them as interpretative guidelines to determine the exact scope of the rights of IDPs and the extent of the state's obligations to promote them in its follow-up awards.

The discussion of Colombia will first highlight the causes of displacement that led to Colombia developing a response to forced internal displacement with a national IDP law and policies. It will then analyse the Colombian national IDP legislation and then identify limitations of the implementation of this legislation. The discussion will then focus on the contribution of the Constitutional Court of Colombia to the prevention of displacement in Colombian government policies.

5.4.2. The Problem of Forced Displacement in Colombia And Its Context

Colombia faced one of the world's most acute internal displacement situations associated with conflict and violence for many decades. The government and the Revolutionary Armed

⁶²⁴ Fadnes, E., & Horst, C. (2009), 'Responses to Internal Displacement in Columbia: Guided by What Principles?', *Refuge: Canada's Journal on Refugees*, Volume 26 Issue 1, 111-120.,p.118.

⁶²⁵ Law 387 adopting measures to prevent forced displacement and to provide care, protection, support and socio-economic stability for persons displaced internally by violence in the Republic of Colombia, Diario Oficial [Official Gazette] No. 43,091 of July 24, 1997, English version is available at: <https://www.refworld.org/pdfid/5a255b374.pdf> [hereafter Law 387 of 1997].

⁶²⁶ There are 62 instruments in total partially regulating either Law 387 of 1997 or Law 1448 of 2011. For the full list see <http://www.globalprotectioncluster.org/2018/07/25/colombia/>

Forces of Colombia (FARC), the country's largest armed group, signed a peace agreement in 2016 which put an end to a conflict that had lasted for more than 50 years. This was a highly significant development and a prerequisite for achieving durable solutions for the country's IDPs. Even if the conflict seems to have ceased, clashes between armed groups or natural disasters still constitute a risk to the significant increase in the number of IDPs. Colombia is afflicted by the world's second largest humanitarian crisis in this field,⁶²⁷ with almost 6 million IDPs who come from the most vulnerable segments of the rural population.⁶²⁸

In order to frame the problem of forced internal displacement in the Colombian context, it is important to bear in mind several reasons for the long-standing internal armed conflict in the country, including the drug trade, political violence and kidnappings, torture, extortion, forced recruitment of children and others by armed groups. Three main actors are considered to be responsible for these illegal acts: the state's armed forces, right-wing paramilitary groups employed by local landowners and businessman to defend their property, and left-wing guerrillas. In these intra-state conflict situations, violence against civilians has become undeniable. Some areas are attractive for their economic wealth, for instance for the cases of illicit crops, the existence of natural resource reserves, such as mining or oil resources or if they are considered potential routes for transporting illegal drugs. Other regions are used by rebel forces as part of their war strategy by driving possible opponents from the region and therefore avoiding civilian resistance.

As a result of these manifold and complex causes, forced displacement occurs either as an unfortunate consequence of conflict and violence against civilians (by product of war) or a deliberate strategy of war. What complicates the Colombian conflict and violence even more is that the government itself must be considered a perpetrator, as the national army has been involved in attacks causing displacement.⁶²⁹ Forced displacement in Colombia still constitutes a humanitarian emergency.

⁶²⁷ Currently Syria is on top of the list in terms of the total number of IDPs.

⁶²⁸ For the latest IDP figures see Global Internal Displacement Database available at: <https://www.internal-displacement.org/database/displacement-data>

⁶²⁹ Fadnes E. & Horst C. (2009). 'Responses to Internal Displacement in Colombia: Guided by What Principles?', *supra* note 624, p.113; also Espinosa, he was the President of Colombian Constitutional Court from June 2005 to April 2006, argued that all of the parties to the conflict including state's armed forces have been found to be responsible for such acts. See Cepeda Espinosa, M. (2009) 'The Constitutional Protection of IDPs in Colombia', *The Brookings Institution – University of Bern Project on Internal Displacement*, p.3.

All of the above factors cause the forced displacement of large numbers of individuals, families and communities—usually from the countryside to urban environments. Every single municipality in the country, regardless of its size, has been affected by the phenomenon. Some of the municipalities have lost more than half of their population; some of the most dramatic examples were Bojaya, Cocorna, El Tarra, Peque and Riosucio.⁶³⁰ Under these circumstances, efforts to draw attention to the need for an effective response to the situation of IDPs from the state authorities, such as public protests by the displaced population, reports from NGOs and the recommendation for the development of national IDP legislation in Colombia by the representative of the UN Secretary-General on IDPs in his report⁶³¹ resulted in the development of Law 387 of 1997, in the drafting of which assistance was provided by UNHCR.⁶³² The adoption of the law 387 provided a juridical basis for subsequent national action regarding internal displacement, and it established the institutional framework for IDP protection, with the National Comprehensive Assistance System for the Displaced Population (SNAIPD).⁶³³ Hence, Law 387 of 1997 became a remarkable turning point in focusing on the development of an adequate and sustained response in support of the displaced population.

5.4.3. Colombian Law on Internal Displacement and Its Relevance to the Prevention of Forced Displacement

The national responsibility to protect IDPs' rights is founded in Article 3 of Law 387, which explicitly confirms that it is the duty of the Colombian State to 'formulate policies and adopt measures to prevent forced displacement; assistance, protection, consolidation, and socio-

⁶³⁰ See geographic distribution of displacement figures at Ibáñez, M. (2009). 'Forced displacement in Colombia: magnitude and causes', *The Economics of Peace and Security Journal*, Vol.4, No.1, p.50.

⁶³¹ Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95, Addendum, Profiles in displacement: Colombia, E/CN.4/1995/50/Add.1 3 October 1994

⁶³² Celis, A. (2009), 'Protection of the Internally Displaced by Constitutional Justice: The Role of the Constitutional Court in Colombia', *The Brookings Institution – University of Bern Project on Internal Displacement*, p.90; Fadnes E. & Horst C.(2009). 'Responses to Internal Displacement in Colombia: Guided by What Principles?', *supra* note 624, p.113.

⁶³³ Sistema Nacional de Atención Integral a la Población Desplazada, see Article 4 regarding the Creation, Composition, and Objectives of the National Comprehensive Assistance System for the Displaced Population of the Law 387 of 1997.

economic stabilization of persons internally displaced by violence'.⁶³⁴ The comprehensive nature of the Colombian IDP-law is evident in three respects. First, it includes an enumeration of IDP rights, including family reunification, protection against discrimination and the right not to be subjected to restrictions upon freedom of movement, and then makes clear that the Colombian State has the responsibility to provide protection of these rights.⁶³⁵ This also means that the Colombian IDP-law contributed to the introduction of a 'rights-based' approach to the protection of the rights of IDPs by defining who may be considered an IDP, as well as defining the rights such people enjoy. Explicit inclusion of IDP rights also reveals the areas in which displaced people are in the greatest need, and identifies their gender, ethnicity and age-based specificities and particular needs. Second, the very adoption of this law means that the existence of forced internal displacement in Colombia has been officially recognised;⁶³⁶ accordingly, there is a need to address the displacement phenomenon. In accordance with this requirement, the obligation imposed on Colombia by Law 387 is to create national institutional responsibility with territorial councils charged with aiding in the policy's implementation at the departmental and municipal levels, such as the creation of a specific national plan to address internal displacement and National Council (advisory body) as well as a national information network (i.e. local information centres, observatory of internal displacement) to assure that measures of immediate assistance are taken.⁶³⁷ By indicating national institutional responsibilities in assisting the displaced population, Law 387 provides an organised framework and effective implementation of the system for protection of IDPs' rights, and increased the priority of protection and assistance toward IDPs at all the relevant official levels. Third, all these responsibilities are structured in accordance with all phases of displacement: prevention and protection during displacement, emergency humanitarian aid following displacement, and socio-economic stabilization, including return and re-establishment in order to find durable solutions to displacement.

⁶³⁴ Article 3 of the Law 387 of 1997.

⁶³⁵ See Title I (Displaced Persons and State Responsibility), Article 2-3 of the Law 387 of 1997.

⁶³⁶ In fact, the Colombian government did not even recognise it had IDPs until the mid-1990s. see Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95, E/CN.4/1995/50/Add.1, para.74.

⁶³⁷ Articles 4-13 of the Law 387 of 1997.

In relation to the prevention of displacement, Law 387 of 1997 established a duty to evaluate situations that can lead to displacement and mitigate its adverse effects, under Articles 8 and 14. According to Article 8, as a preventive action, municipal committees have the responsibility to provide guidance to communities that may be affected by an act of displacement as a result of conflict, and to take measures, such as analysing the viability of legal claims brought by IDPs and assessing the appropriate assistance measures, to minimise or eradicate the cause of persecution or violence which could eventually lead to forced displacement. These preventive actions are strengthened by Article 14, which provides a list of measures to prevent forced displacement caused by violence. Furthermore, the rights-based perspective on the protection against forced displacement is given with Article 2(7), which explicitly states that Colombian IDPs 'have the right not to be forcibly displaced'. However, it needs to be highlighted that The Colombian Law developed in the context of internal conflict, therefore, limits the content of the right not to be displaced to people displaced as a result of internal conflict. This also means that national authorities are responsible for taking preventive measures to conflict-only situations that may cause internal displacement. As the displacement as a result of natural disasters also constitutes one of the main causes of displacement, this clearly limits the scope of the Colombian Law in terms of prevention of displacement. Nonetheless, the Colombian government supported the establishment of an early warning system, Sistema de Alerta Temprana (SAT), to strengthen its response to conflict-induced displacement, in coordination with the Ombudsman's Office of Colombia.⁶³⁸

The SAT is mandated to warn about situations and promote the integrated humanitarian prevention of the State before the effects of armed conflict, with the goal of protecting and guaranteeing the civil population's fundamental rights in a timely manner.⁶³⁹ While identifying specific at-risk populations, SAT examines their degree of vulnerability to violence, as well as specific threats that they have received, or situations and conditions that place them at a higher risk compared to the overall population. Violations are occurring not

⁶³⁸ The Ombudsman's Office of Colombia (Spanish: Defensoría del Pueblo) is the national government agency that is charged with overseeing the protection of civil and human rights within the legal framework of the Republic of Colombia.

⁶³⁹ see the website of the Ombudsman's Office of Colombia, Sistema de alertas tempranas – SAT, available in English at: <https://www.defensoria.gov.co/es/public/atencionciudadanoa/1469/Sistema-de-alertas-tempranas---SAT.htm>

only in the remoter areas of the national territory and along the country's borders, but increasingly in urban areas as illegal armed actors have taken advantage of the massive IDP population.

The SAT has set strategic and specific objectives that include early warning, conflict prevention, humanitarian intervention, and conflict resolution.⁶⁴⁰ The primary objective of the SAT is to identify current and emerging threats to human rights and IHL, and to respond immediately to imminent or impending violations before they occur.⁶⁴¹ The establishment of SAT can be viewed in the context of Colombia's obligation to provide preventive measures under Law 387 of 1997. In addition to that, SAT's mandate should be viewed in accordance with Colombia's constitutional and international treaty commitments to protect human rights and to comply with IHL. The protection of human rights and ensuring respect for IHL, as stated in Article 14 of Law 387 regarding the prevention of conflict, is one of the objectives of Colombian IDP legislation.⁶⁴² In this regard, Colombia's Early Warning System is an essential instrument of government policy to implement this aim. The Colombian authorities even take further steps to strengthen this early warning model to respond quickly and effectively to imminent threats of massive violations that may cause displacement before they occur and adopted national IDP-policy in 2005 as a complementary measure to the effective implementation of national IDP legislation.⁶⁴³ The 2005 National IDP Plan provides a national institutional focal point (Acción Social and Inter-Institutional Early Warning Committee) which is responsible for IDP registration, local economic development and prevention and protection of displaced population's rights.⁶⁴⁴ For an effective implementation of preventive measures, joint responsibility by national, local and regional authorities as well as complementary actions of civil society is made clear in Article 4(1) of the National IDP Plan.

⁶⁴⁰ Ibid.

⁶⁴¹ For the list of strategic and specific objectives of the SAT, see Chernick, M. (2004), 'Evolution of Colombia's Early Warning System', p.34 in The Brookings Institution – University of Bern Project on Internal Displacement (2009) 'Judicial Protection of Internally Displaced Persons: The Colombian Experience', available at: https://www.brookings.edu/wp-content/uploads/2016/06/11_judicial_protection_arango.pdf

⁶⁴² Article 14 (4) of the Law 387 of 1997.

⁶⁴³ 2005 - Decreto No. 250 Por el cual se expide el Plan Nacional para la Atención Integral a la Población Desplazada por la Violencia y se dictan otras disposiciones, English version: National Plan on Comprehensive Assistance for the Population Displaced by Violence (hereinafter National IDP Plan)

⁶⁴⁴ See 2005 National IDP Plan p.1 for funding mechanism, pp. 26-27 for institutional focal point, pp. 28-31 for the IDP registration system available at: <https://www.refworld.org/docid/46d58ff92.html> [accessed 20 February 2020]

In accordance with the above descriptions of the content of Colombian national legislation regarding the prevention of displacement, the following conclusion can be reached. As discussed in the first section of this chapter, three out of 12 practical steps to decide the government's effective response to displacement are believed to be the most relevant benchmarks in analysing the comprehensiveness of national IDP frameworks in terms of prevention of arbitrary displacement. These are to prevent displacement and minimize its adverse effects (Benchmark 1), create a legal framework for upholding the rights of IDPs (Benchmark 5) and develop a national policy on internal displacement (Benchmark 6). A closer look at the relevant articles dealing with the prevention of displacement reveals that Colombian national IDP legislation includes all three steps, therefore also considered as a comprehensive IDP framework in terms of prevention of displacement, as it creates a legal framework for upholding the right not to be forcibly displaced with Article 2 of Law 387. Indeed, the very adoption of Law 387 represented a substantial achievement for upholding IDP rights in general. Furthermore, in order to effectively implement government policies on internal displacement, a national plan for IDP protection was developed that outlined the responsibilities of national authorities in line with their obligations and establishes a mechanism for coordination (Inter-Institutional Early Warning Committee) of the imminent response to internal displacement. Finally, both Colombian IDP Law 387 of 1997 and 2005 National IDP Plan placed a particular emphasis on preventing arbitrary displacement, with specific measures elaborated for avoiding the conditions that cause displacement and minimizing displacement's adverse effects.⁶⁴⁵

Despite the comprehensive reach of the national IDP law, some discrepancies have been observed in the actual implementation of the instrument's relevant articles to the prevention of displacement. This gives the impression that the Colombian IDP framework could be assessed as comprehensive on paper but limited in practice, as the next section will discuss, which led to an intervention by the Constitutional Court.

⁶⁴⁵ Articles 8 & 14 of Law 387 of 1997; Article 4 of 2005 National IDP Plan

5.4.4. Limitations of the Implementation on the Colombian IDP-Law regarding the Prevention of Displacement

Certain limitations in the implementation of national IDP law have emerged because of the challenging conditions Colombia has been facing. The main obstacle in the prevention of displacement is increasing violence by new armed groups despite the expected decrease in violence with the peace agreement between the government and FARC in 2006.⁶⁴⁶ Preventing forced displacement in the midst of an internal armed conflict is challenging as the ongoing violence has limited the capacity of the government to implement its commitments in some areas where it does not exercise control.

The Early Warning System, SAT, coordinated by the Human Rights Ombudsman's office and the Ombudsman gathers, verifies and analyses the information related to the civil population's state of vulnerability and risk as a consequence of the armed conflict and sends a risk report to the Inter-Agency Early Warning Committee (CIAT). However, deficiencies in the risk evaluation procedure and the efficacy of the responses have been reported. For instance, the HRC's Concluding Observation highlighted the increasing number of SAT risk reports which are not converted into early warnings by the CIAT and also noted that in some cases there are no responses or effective prevention measures, which at times continues to result in massive displacements.⁶⁴⁷ Moreover, the UNHCR report on Colombia observes that on many occasions, responses to early warnings are not capable to avoid rights violations or infractions, due to various factors.⁶⁴⁸

In the context of prevention of displacement, two main factors have been observed as limitations of the system. First, as the early warning system is basically designed for the prevention of displacement as a result of conflict, which also constitutes a limitation on its own for not covering other causes of displacement, governmental effort to prevent

⁶⁴⁶ See UNHCR's website 'Forced displacement growing in Colombia despite peace agreement', 2017, available at: <https://www.unhcr.org/uk/news/briefing/2017/3/58c26e114/forced-displacement-growing-colombia-despite-peace-agreement.html>

⁶⁴⁷ HRC , Concluding observations of the Human Rights Committee, Colombia , August 2010 ,CCPR/C/COL/CO/6, para.13.

⁶⁴⁸ See UNHCR Global Report 2004, Colombia Section at pp. 475-481, available at: <https://www.unhcr.org/uk/publications/fundraising/42ad4d960/unhcr-global-report-2004-colombia.html>

displacement is regarded as a military approach.⁶⁴⁹ This means that instead of protecting civilians caught in the middle of the conflict, priority is given to protect areas of military importance.⁶⁵⁰ Moreover, as part of their military strategy, the government's policy of displacement prevention is identified as the incorporation of the civil population in the conflict (peasant soldiers, informants, and rewards)⁶⁵¹ which makes it difficult to distinguish between combatants and non-combatants and also places the civil population in a situation of grave risk. Second, Colombia's government policy heavily focuses on the return of IDPs to their place of origin, and therefore the IDP law's relevant provision on prevention of displacement in the first place is poorly implemented. As a result, public officials appear to be more concerned with preventing the arrival of more IDPs in major cities without paying due attention to how to prevent people from being displaced in the first place, or IDPs are forced to return to their land without overcoming security issues.⁶⁵²

Despite making some positive efforts to prevent gross human rights violations through the introduction of the SAT in the country, the persistence of serious violations of human rights and particular vulnerabilities of displaced people required Colombia to strengthen its early warning system and to ensure that preventive measures taken at the departmental, municipal and other levels contribute to the coordination of preventive measures.⁶⁵³

In terms of state responsibility, according to the HRC, the lack of responses or effective prevention measures that resulted in massive displacements are a violation of Article 2 (non-discrimination clause) of the ICCPR, which places an obligation upon a state party to respect and to ensure rights to all individuals within its territory and subject to its

⁶⁴⁹ For the discussions on Colombian government's military approach see Fadnes E. & Horst C.(2009). 'Responses to Internal Displacement in Colombia: Guided by What Principles?', *supra* note 624, p.114; Arango R.(2009). 'The human rights of the Victims of Forced Internal Displacement in Light of the Progressivity of Economic, Social and Cultural Rights, The Colombian Experience', in The Brookings Institution – University of Bern Project on Internal Displacement(2009) 'Judicial Protection of Internally Displaced Persons: The Colombian Experience', available at: https://www.brookings.edu/wp-content/uploads/2016/06/11_judicial_protection_arango.pdf, pp.14-142.

⁶⁵⁰ In his mission to Colombia, Secretary-General on the Human Rights of Internally Displaced Persons stated in his report that soldiers were sent to protect Pan American Highway instead of the villagers who were caught in the middle of the hostilities. HRC, A/HRC/4/38/Add.3, 24 January 2007, para 43.

⁶⁵¹ Arango, R. (2009). 'The human rights of the Victims of Forced Internal Displacement', *supra* note 649, p.142.

⁶⁵² Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Mission to Colombia, HRC, A/HRC/4/38/Add.3, 24 January 2007, paras. 40-45.

⁶⁵³ HRC, (2010) Concluding observations of the Human Rights Committee, Colombia, CCPR/C/COL/CO/6, para.13.

jurisdiction.⁶⁵⁴ In its Concluding Observation, the HRC's interpretation of the violation of non-discrimination clause can be explained in two ways: first, discrimination may arise directly from some activities of a state such as exclusion from the allocation of resources of the particular displaced groups. For instance, the country's indigenous and Afro-Colombian populations have been violently expelled from their ancestral territories because of the natural resources located there. They have been disproportionately affected by forced internal displacement because their right to be protected against arbitrary displacement was not protected and sufficient resources were not allocated to the protection of their culture and land.⁶⁵⁵ As a result, more than a dozen of the country's indigenous cultures are at high risk of extinction in the near future.⁶⁵⁶ Second, the violation of human rights of IDPs could indirectly constitute discrimination against displaced populations because these violations may cause their particular vulnerability to all sorts of general and/or specific risks. In other words, for instance, the absence of effective protection on housing and land creates a vicious circle, in which IDPs are not given the necessary resources to sustain themselves, and with time they become even more vulnerable, as they cannot cover their basic needs and this has led to the further detriment of their other rights, such as the right to healthcare and education. In this case, IDPs may not be the object of discrimination but they may nevertheless face unequal treatment. In this regard, the scope of the duty of non-discrimination has been defined by Principle 1 of the Guiding Principles, which prohibits discrimination of the displaced population, recommends the adoption of affirmative measures in favour of special groups within the displaced population, and highlights the importance of securing equal treatment for displaced persons.⁶⁵⁷ Following from this, in the scope of the right to protection from displacement, Colombia's limited and ineffective

⁶⁵⁴ Article 2 defines the scope of the legal obligations undertaken by States Parties to the ICCPR. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction

⁶⁵⁵ In its follow-up Award 218 of 2006, the Colombian Constitutional Court evaluated the governmental actions concerning vulnerable IDP groups and found that indigenous and Afro-Colombian groups' relationship with their territory and its resources transforms forced displacement into a direct threat to the survival of their cultures. Colombian Constitutional Court, Award 218 of 2006, Republic of Colombia Constitutional Court Third Review Chamber -Orders issued by the Court- Re.: Decision T-025 of 2004 and Awards (Autos) 176, 177 and 178 of 2005, para. 6.2. for English version see <https://www.refworld.org/docid/4c624a842.html>, p.327.

⁶⁵⁶ Official website of BBC News 'Colombia's indigenous peoples face uncertain future', available at: <https://www.bbc.co.uk/news/world-latin-america-15790395> [last accessed 30.09.2019]

⁶⁵⁷ Principle 1 (1) of the Guiding Principles: 'Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.'

response to the early warning systems may prevent the effective enjoyment of the rights of displaced persons, thus constituting discrimination against them. There exists a clear interdependence among different rights being violated. The absence of effective protection against displacement in the first place, for example, directly affects the possibility of exercising other fundamental rights. This implies that the rights of IDPs form part of an indivisible group of rights that have both a negative and a positive dimension. In other words, they impose both positive and negative duties and obligations upon the state.⁶⁵⁸ Such perspective was reflected in the intervention of the Constitutional Court, which aimed at reinforcing Colombia's state obligations towards the protection of IDP rights, and therefore re-shaping the development of the right not to be arbitrarily displaced at the national level.

5.4.5. The Contribution of the Constitutional Court of Colombia to the Prevention of Displacement in Colombian Government Policies

Through its jurisprudence, the Colombian Constitutional Court has had a significant impact on government policy and its response to the specific needs and vulnerabilities of IDPs in many aspects, especially since the national IDP law was adopted. The Court's impact can be identified in a number of key decisions, which will be provided in the following discussion. The landmark decision is the Decision T-025 of 2004. The main reason behind the Constitutional Court's Decision T-025 of 2004 on the rights of victims of internal displacement is tutela actions that presented by 1150 displaced families composed primarily of female heads of households, children, elderly persons and indigenous peoples.⁶⁵⁹ The important petition procedure tutela was introduced with the adoption of the 1991 Colombia's Constitution, and enabled Colombian citizens to denounce violations of basic

⁶⁵⁸ For a detailed discussion on third generation of human rights see Chapter 4, Section II (The Right not to be Arbitrarily Displaced as a Free-Standing Right) of this thesis.

⁶⁵⁹ In total, the Court accumulated 108 lawsuits of tutela actions. The English version of the summary of the Court's Decision T-025/04 is available at the Colombia's Constitution Court's official website at: <https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=9259>

rights and receive a decision within ten days.⁶⁶⁰ The Tutela is a complaint that any citizen can bring before any judge in order to seek an immediate judicial injunction against actions or omissions of any public authority that they claim violates their constitutional fundamental rights.⁶⁶¹ Faced with a lack of effective and persistent assistance to meet their needs, thousands of IDPs have turned to constitutional protection to stop their situation from worsening. In practice, IDPs denounce the violations of their rights by filing tutela lawsuits and seeking judicial protection of their rights under the tutela action.

As a response to the plight of Colombian IDPs, the Constitutional Court's T-025 ruling was considered a landmark decision by legal scholars⁶⁶² because the Constitutional Court acknowledged the existence of a humanitarian crisis and formally declared that IDPs' inhumane living conditions needed to be addressed by all of the competent authorities, and concluded that the current assistance and response by the government towards IDPs was unconstitutional, ordering the state to promptly address this issue.⁶⁶³ This decision demonstrates the gap between the rights guaranteed to IDPs by domestic law and the insufficient resources and/or capacity of the government to protect these rights. In terms of protection from internal displacement, Decision T-025 of 2004 had contributed to the content of the right not to be arbitrarily displaced because the Constitutional Court has incorporated the Guiding Principles into the Colombian national law and used them as interpretative guidelines to determine the content of state obligations towards the displaced population in the prevention of displacement. The areas in which the Constitutional Court's contribution to the protection of IDP rights along with references to the Guiding Principles are the following:

⁶⁶⁰ See Articles 86-87 of the Colombia's Constitution of 1991, English version available at: https://www.constituteproject.org/constitution/Colombia_2005.pdf

⁶⁶¹ Espinosa Cepeda, M.J. (2006) 'How far may Colombia's constitutional court go to protect IDP rights?', *Forced Migration Review*, p 21.

⁶⁶² Góngora argues that: '... in particular, in Ruling T-025/2004, which is a "ground-breaking" decision on behalf of rights of displaced persons. See Góngora Mera, M. E. (2011). 'Inter-American Judicial Constitutionalism : on the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication', San José, C.R. : *Inter-American Institute of Human Rights*, p.238; also Rodrigues argues that: '...Constitutional Court's decision regarding displaced populations (decision T-025 of 2004), known for being one of the most innovative and active in the judicial protection of constitutional rights.', see Rodrigues, C (2014), 'Judicial Activism and Forced Displacement: Lessons from the Colombian Paradox', *International Journal of Constitutional Law*.

⁶⁶³ Corte Constitucional de Colombia (CC), Sentencia T-025/2004.

- adoption of a rights-based approach for the effective enjoyment of IDPs' fundamental rights
- to determine the content of the Colombian State's responsibility in the prevention of displacement
- help to further evaluation of IDP rights in regional courts i.e. Inter-American Court of Human Rights

These three areas are now examined in the following sections in order to clearly delineate the significant role of the Constitutional Court.

5.4.5.1. The Constitutional Court's rights-based approach for the effective enjoyment of IDP's fundamental rights

The Constitutional Court's right-based approach became evident after 2004 in a number of situations. After reviewing over 100 tutela files, in its decision T-025 of 2004, the Constitutional Court declared that an 'unconstitutional state of affairs' existed as a result of the lack of coherence between the rights guaranteed to IDPs by domestic law 387 and the insufficient resources and institutional capacity of the government to protect these rights.⁶⁶⁴ The factors that confirm the existence of an unconstitutional state of affairs in the context of forced displacement includes a massive and generalized violation of several constitutional rights, which affects a significant number of people, a protracted omission by the authorities in complying with their obligations to secure rights and a repeated and constant violation of fundamental rights.⁶⁶⁵ The violation of IDPs' rights in Colombia had been previously addressed by the Constitutional Court's three different decisions prior to its decision T-025

⁶⁶⁴ 'On the grounds of the foregoing reasons, Review Chamber Number Three of the Constitutional Court, imparting justice in the name of the people and by mandate of the Constitution decides [t]o Declare the existence of an unconstitutional state of affairs in the situation of the displaced population, due to the lack of coherence between the seriousness of the violation of the rights recognized in the Constitution and developed by the legislation, on the one hand, and the volume of resources effectively destined to secure effective enjoyment of said rights and the institutional capacity to implement the corresponding constitutional and legal mandates, on the other hand.' Part IV, Decision No. T-025 of 2004, *supra* note 561, p.275.

⁶⁶⁵ Part III, Section 7 of Decision No. T-025 of 2004, *supra* note 561, pp. 270-281.

of 2004.⁶⁶⁶ This is the reason for the Court's emphasis on repeated violation of the fundamental rights of many displaced persons as one of the elements of an unconstitutional state of affairs. So that, the Constitutional Court's previous decisions on the violations of IDP rights mean that these rights are still being repeatedly violated by Colombia.

In its previous decisions, the Constitutional Court identified the violation of IDPs' rights such as their rights to education, healthcare, adequate standards of living and participate in the decision-making process, but without making a formal declaration on the existence of such a state of affairs. The formal declaration of an unconstitutional state of affairs in decision T-025 of 2004 enabled the Constitutional Court to adopt an evolutionary interpretation in its decision. This evolutionary aspect may allow the Constitutional Court to order the effective enjoyment of IDPs' rights rather than ordering the mere respect for their rights. Therefore, for IDPs to enjoy their rights, some concrete steps had to be taken by the Colombian State. For instance, the Constitutional Court has centred its attention on the requirement of carrying out certain actions, such as programmes and strategies designed from a medium-term perspective, for the purpose of improving the institutional infrastructure for the protection of IDPs. The Constitutional Court even took it further and issued a series of follow-up awards in order to overcome an unconstitutional state of affairs for the benefit of not only the plaintiffs⁶⁶⁷ but also the entire displaced population, such as measures that need to be taken to address the flaws in the national IDP policies' implementation, establishment of the dialogue between competent authorities and organizations representing displaced persons, budget allocation, coordination, program design.⁶⁶⁸

One of the novel aspects of the Constitutional Court's decision in the protection of IDP-rights is that it made several references to the Guiding Principles, and relied on these Principles as one of the main sources in order to justify its decision. The judgments adopted before Decision T-025 of 2004 had not explicitly incorporated the entire set of principles (30

⁶⁶⁶ See Decision SU-1150 of 2000, Decision T-327 of 2001 and Decision T-098 of 2002.

⁶⁶⁷ The Court issued orders aimed at responding to the concrete petitions of the plaintiffs' claims such as obtaining emergency humanitarian aid, economic stabilization, housing, access to education for children, access to health care services and the provision of medicines within a given period of time. See Section 10.2. (The orders required to respond to the requests of the plaintiffs in the present proceedings) of Decision No. T-025 of 2004, *supra* note 561, p272.

⁶⁶⁸ See Section 10.1. (Orders aimed at overcoming the unconstitutional state of affairs) of Decision No. T-025 of 2004, p.266.

in total) into the national system for the protection of IDPs' rights.⁶⁶⁹ In this regard, the Constitutional Court acknowledged in Decision T-025 of 2004 that in establishing the scope of IDPs' rights, it makes decisions that take into account 'both the constitutional and legal framework, and the interpretation of the scope of the rights summarized in the 1998 international document entitled Guiding Principles on Internal Displacement.'⁶⁷⁰ This means that the Guiding Principles constitute a significant parameter for interpretation of domestic legislation. The Guiding Principles' incorporation into the Colombian system is explained by the 'constitutional block' which is also acknowledged by the Constitutional Court in its following decision in 2006 relating to the process of IDP status recognition and registration as follows:

'[t]he most favourable interpretation of the most appropriate legal protection of displaced persons also includes consideration of the Guiding Principles of Internal Displacement enshrined in the Report of the Special Representative of the Secretary-General of The United Nations United Nations for the Issue of Internal Displacements of Persons, which are part of the supranational normative body that is part of the constitutionality block of this case.'⁶⁷¹

The legal justification for the incorporation of the Guiding Principles into the Colombian national IDP policies lies in Article 93 of the Colombia's Constitution, which establishes that 'international treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority'.⁶⁷² According to this understanding, 'norms and principles which, even though they do not appear formally within the articles of the constitutional text, are used as parameters for constitutional judicial review of legislation because they have been normatively integrated into the Constitution through different channels and by mandate of the Constitution itself.'⁶⁷³ As the

⁶⁶⁹ Guzmán Duque, F. (2009), 'The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia', *The Brookings Institution – University of Bern Project on Internal Displacement*, p.178.

⁶⁷⁰ Decision No. T-025 of 2004, Part III (Considerations And Legal Grounds For The Decision), Section 5, p.221.

⁶⁷¹ Sentencia T-468/06 Registro Nacional de Poblacion Desplazada-Requisitos, Section II, para. 8. English version is available in the official website of the Colombian Constitutional Court at: <https://www.corteconstitucional.gov.co/relatoria/2006/T-468-06.htm>

⁶⁷² Colombia's Constitution of 1991, English version available at: https://www.constituteproject.org/constitution/Colombia_2005.pdf

⁶⁷³ see Colombian Constitutional Court, Decision C-225 of 1995; also see the Court's Decision C-191 of 1990 which states that "the constitutionality block would not only be composed of the Articles of the Constitution,

Guiding Principles restates and compiles human rights and humanitarian law relevant to IDPs, the majority of these principles originate from human rights and humanitarian law provisions⁶⁷⁴ which are ratified by the Colombian State. In this regard, the Constitutional Court embraced the Guiding Principles as an instrument for interpreting the existing international law in the field of internal displacement.⁶⁷⁵ According to this, the main functions of the Guiding Principles can be identified as to determine the exact scope of the rights of IDPs and state responsibility towards them. In this respect, the inclusion of the Guiding Principles also serves to incorporate the right not to be arbitrarily displaced which is only expressly recognised in Law 387 of 1997 but not expressly recognised by the 1991 constitutional text. The fundamental constitutional rights are threatened or violated by situations of forced internal displacement and Principles relating to protection from displacement in the Guiding Principles (Principles 5-9) were seen pertinent for interpreting the scope of these fundamental rights in the context of forced internal displacement. For this reason, the Constitutional Court enumerated the following rights that apply once forced displacement has taken place and cited the specific principles relating to protection from arbitrary displacement to clarify the content:⁶⁷⁶

- the right to life and the right to personal security: The evaluation of the scope of these rights and the extent of the state's obligation in the context of forced internal displacement were done with Principle 8, among others,⁶⁷⁷ which states "[d]isplacement shall not be carried out in a manner that violates the rights to life,

but also of the international treaties referred in Article 93 of the Constitution, by organic legislation and, on some occasions, by statutory legislation." English version cited in Rincón,T.(2009), 'The Judicial Protection of Internally Displaced Persons in Colombia: National and Inter-American Perspectives', *The Brookings Institution – University of Bern Project on Internal Displacement*.

⁶⁷⁴ For the full list of the legal basis of the Guiding Principles visit UNHCR's official website available at: <https://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx>

⁶⁷⁵ See Annex 3 (The duties of the State in relation to the protection of the fundamental rights of people in situations of displacement, according to the Guiding Principles of Forced Internal Displacement) of the Decision T-025 of 2004, pp.184-202.

⁶⁷⁶ In order to clarify the content of the rights that comprise the minimum positive levels of protection, the Court enumerated many other rights in accordance with the specific Principles such as the right to health (in accordance with Principle 19), the right to a family and to family unity (in accordance with Principle 17) and the rights to dignity and to physical, psychological and moral integrity (as clarified in the Principle 11). For the full list of the rights and their relevance to the Principles see section 9 of the Decision T-025 of 2004, *supra* note 561, p.260.

⁶⁷⁷ In the content of the right to life Principles 1, 10 and 13 were also utilised for the interpretation; in the content of the right to personal security Principles 10,12,13, and 15 were utilised.

dignity, liberty and security of those affected” because practices that violate IHL and IHRL which might place the life and security of the displaced population at risk.

- the right to protection against displacement of children, women, persons with disabilities and elderly persons, and other specially protected groups: The interpretation of this right was carried with in accordance with the content of Principle 9, among others,⁶⁷⁸ which imposes obligation on states to protect against the displacement of certain groups of displaced persons.
- the right to choose their place of residence and freedom of movement across the national territory : These two right have a particular relevance on the determination of the scope of the IDPs’ right not to be arbitrarily because Principles 5 (state obligation to prevent and avoid conditions that might lead to displacement of persons), 6 (the right not to be arbitrarily displaced) and 7 (the conditions for lawful restriction of the right not to be arbitrarily displaced and the permissible grounds for displacement) ,among others,⁶⁷⁹ were found relevant for interpreting the scope of these rights in regards to the displaced population. The Court used these principles as interpretative parameters to determine the practices which are forbidden by international law because they entail a coercion toward the displacement of persons.
- the right to peace and the right to personal integrity: Given that the very act of forced displacement is threaten the peace of displaced persons and the high risk of attacks to which they are exposed because of their condition of dispossession especially in conflict situations, Principles 6 and 7 found useful for the interpretation of these rights because Principles 6 and 7 establish a state obligation to take all feasible alternatives, and displacement must be unavoidable and the only option available.

Consequently, the Constitutional Court provided the applicability of the IDPs’ right to protection from displacement in accordance with the relevant principles dealing with

⁶⁷⁸ Principles 2 and 4 were also utilised for the interpretation.

⁶⁷⁹ In the content of the right to choose their place of residence Principles 14 and 15 were also utilised for the interpretation; in the content of the right to freedom of movement across the national territory Principles 1,2 and 14 were utilised.

protection from arbitrary displacement, and specified the minimum content of IDPs' rights which must always be satisfied by the Colombian State.⁶⁸⁰ Indeed, the requirement of securing minimum levels of protection of all IDPs' rights derived from the constitutional protection of certain rights of the displaced population. Incorporation of the Guiding Principles into the national system helps to clarify the content of the rights that comprise the minimum levels of protection that must be satisfied under all circumstances. In this sense, the Constitutional Court did not establish a new obligation for the government but made the extent of its obligation clear to promote the right not to be arbitrarily displaced. Thus, the Constitutional Court's rights-based approach made visible the specific situations of IDPs and the need for protecting their rights rather than just affirming them being in a vulnerable condition. Overall, the Constitutional Court contributed substantially, with its right-based approach, to the clarification and refinement of the conditions regarding Principle 6, therefore allowing for the further development of the right at the national level.

5.4.5.2. The Constitutional Court's interpretation of Colombia's responsibility in the prevention of displacement and its contribution to the Inter-American Court decisions

Apart from the first area of a human rights-based approach, the Constitutional Court also played a key role in the area of interpreting Colombia's responsibility in the prevention of internal displacement. The Constitutional Court has developed its case law on forced internal displacement in light of the 1991 constitutional and 1997 legal frameworks and has taken into account the interpretation of the scope of IDPs' rights compiled in the Guiding Principles. Following from this, the state's constitutional obligation to prevent forced internal displacement derives mainly from Articles 13 (the right to protection from discriminatory practices based on the condition of displacement) and 24 (freedom of movement across the national territory) of 1991 Colombia's Constitution. Then, on the

⁶⁸⁰ 'the Court highlights that there exist certain minimum rights of the displaced population, which must be satisfied under all circumstances by the authorities, given that the dignified subsistence of the people in this situation depends on it., Section 9 (The minimum levels of satisfaction of the constitutional rights of displaced persons) of the Decision T-025 of 2004, p.260.

grounds of Law 387 of 1997's legal framework, Colombia's obligation derives from Article 2(7) (the right not to be forcibly displaced) and Article 14 (the measures for the prevention of displacement). Finally, the scope of this right has been interpreted by reference to Principles 5-9, which prohibit unlawful acts of displacement, imposes an obligation to take measures to prevent displacement and provides the right not to be arbitrarily displaced. In addition, Civil Society Commissions and IDP representatives from different organisations also contributed to the understanding of the content of IDPs' right not to be arbitrarily displaced in the follow-up process that ensued after the adoption of Decision T-025 of 2004. For instance, the Civil Society Commission for the Follow-Up of Compliance with Decision T-025 of 2004, in its 2006 report to the Court stated that Colombia's responsibility to assist members of indigenous peoples is grounded on the Guiding Principles, which clearly state the obligation of taking measures of protection against the displacement of indigenous peoples.⁶⁸¹ This is particularly relevant with Principle 9, which deals with obligation to protect against the displacement of indigenous peoples. Moreover, in the follow-up process, the Prosecutor invoked Principle 7 to determine the extent of Colombia's obligation with regard to the prevention of displacement, and concluded that 'the national Government has failed to adopt measures that are fit to prevent the operations of the Armed Forces from causing forced displacements, and to apply, in the cases in which such displacements could have been foreseen, measures to secure that the least possible damage be caused upon the victim population, like those established in Principle 7.3 of the Guiding Principles on Internal Displacement.'⁶⁸²

In light of the above-mentioned provisions of both Law 387 of 1997 and the 1991 Colombian Constitution, and the relevant Principles on prevention of displacement, the state's obligation in relation to IDPs' protection from arbitrary displacement includes the adoption of the measures necessary to prevent displacement, negative and/or positive obligations, and when displacement occurs, then it is obliged to protect the victim and to mitigate its effects (positive obligation). However, it is important to note that the magnitude of the crisis of displacement and the existence of internal armed conflict in the country makes it

⁶⁸¹ Cited from the Colombian Deputy Justice Duques's article, Guzmán Duque, F. (2009), 'The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia', *supra* note 669, p. 201.

⁶⁸² *Ibid.* p. 193.

very difficult to develop an adequate and sustained response in favour of the displaced population. As acknowledged by the Constitutional Court, the serious situation of the displaced population is not only caused by the state, but rather by the internal conflict, and in particular by the actions of irregular armed groups.⁶⁸³ At this point, a question which arises is whether human rights obligations are owed by the state because these people were victims not only of the state but of the insurgent groups. There are two answers in the case law in terms of Colombia's obligation on the IDPs' right to be protected from displacement: one is Colombia's Constitutional Court, the other one is the IACrtHR.

According to the Colombian Constitutional Court, the authorities have obligations to secure a minimum level of protection of IDPs' rights regardless of the circumstances, and the state has a duty of preserving the minimum public order conditions to prevent the forced displacement of persons and guarantee the personal security of the members of society.⁶⁸⁴ So, the Constitutional Court specified that the minimum content of IDPs' rights must be guaranteed at all times. This decision can be interpreted as the minimum content of IDPs' rights is part of the content of the minimum obligations owed by the Colombian State that have ratified IHRL instruments. Therefore, Colombia has an obligation to secure a minimum level of satisfaction of IDP-rights that should be guaranteed to all IDPs at all times even if the rights are violated by irregular groups. State obligations entailed by human rights standards can be divided into obligations to respect, obligations to protect and obligations to fulfil the human right in question.⁶⁸⁵ In this respect, the state's obligation arising from the obligation to protect is to ensure that people's human rights are not threatened by third parties or other circumstances, and to fulfil this obligation it is required that states undertake adequate efforts to create reasonable living conditions.⁶⁸⁶ According to the Committee on Economic, Social and Cultural Rights (CESCR), states have a minimum core obligation to ensure the satisfaction of human rights and to take necessary steps to ensure the maximum of its available resources. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate

⁶⁸³ Decision T-025 of 2004, Section 6, p.230.

⁶⁸⁴ The Court highlights that by virtue of Article 2 of the Constitution, the State has the duty to protect the population affected by this phenomenon, and in this way it is bound to adopt a response to such situation. See Decision T-025 of 2004, Section 5.2. para 17, p.221; also see Section 6, p.230.

⁶⁸⁵ Kälin W. & Künzli J.(2010), 'The Law of International Human Rights Protection', *supra* note 173, pp. 96-97.

⁶⁸⁶ This obligation is defined as minimum core obligation by the CESCR.

that every effort has been made to use all resources.⁶⁸⁷ In this particular case, the same obligations apply to the Colombian State.

According to the IACrHR, in the *Mapiripán Massacre v. Colombia*⁶⁸⁸ case, the basis for state responsibility for the acts of non-state agents is the acknowledgement of the collaboration of members of the Colombian National Army in these armed incursions which underlines the state's responsibility for human rights violations committed in these situations. In this sense, Colombia has two types of responsibility. One derives from the act or the omission of its agents whenever they are in a position of guarantors. The other is the state's international responsibility that arises from the acts of private persons which are, on principle, not attributable to the State but have been carried out with the support or permission of State agents.⁶⁸⁹ The very origin of such responsibility in fact arises from non-fulfilment of the obligations set forth in Articles 1(1) (state's obligation to respect rights and freedoms) and 2 (state's obligation to adopt legislative or other measures as may be necessary to give effect to those rights or freedoms) of the American Convention. In this regard, the IACrHR has pointed out that

'In accordance with Article 1(1) any form of exercising public authority that violates the rights embodied in the Convention is unlawful. In this regard, any circumstances in which a body or official of the State or of a public institution inappropriately abridges one of said rights constitutes disregard for the duty to respect rights, enshrined in that Article.

This conclusion is independent of whether the body or official acted contravening domestic legal provisions or going beyond the limits of his own sphere of competence, as it is a principle of International Law that the State is responsible for the acts of its agents carried out in their official capacity and by their omissions, even if they act outside the limits of their sphere of competence or in violation of domestic law [...]. Said international

⁶⁸⁷ CESCR(1990), 'General Comment No. 3: The Nature of States Parties' Obligations'(Art. 2, Para. 1, of the Covenant), E/1991/23, para. 10.

⁶⁸⁸ IACrHR, *Mapiripán Massacre v. Colombia*, Ser. C No. 134(2005), para.111.

⁶⁸⁹ Inter-American Court of Human Rights ,Case of the Mapiripán Massacre v. Colombia ,Judgment of September 15, 2005 (Merits, Reparations, and Costs) para. 111.

responsibility may also be generated by acts of private individuals not attributable in principle to the State.⁶⁹⁰

In other words, the international responsibility of the state is found in support or tolerance by public authorities of the infringement of the rights embodied in the Convention, or omissions that enabled these violations to take place. Moreover, the state's responsibility is also reflected in the positive obligation of the state to take such steps as may be necessary to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons.⁶⁹¹

According to the IACrHR's ruling, the forced displacement of people violates the rights of freedom of movement and residence (Article 22 of the American Convention). Besides this recognition, what is important within the content of prevention of displacement is that the IACrHR granted particular relevance to the Principle 8 of the Guiding Principles as rules for the interpretation of Article 22⁶⁹² and stated that 'despite its international obligations (United Nations Guiding Principles on Internal Displacement) as well as its national obligations (Law 387 of 1997), the State took no steps to prevent displacement of the residents of Mapiripán.'⁶⁹³

The final area that is significant for the Constitutional Court's role in the development of the right not to be arbitrarily displaced concerns how the decisions of the regional courts have referred to the Constitutional Court in their decisions concerning internal displacement. On many occasions, the IACrHR's explicit reference to decisions of the Colombian Constitutional Court⁶⁹⁴ shows the Constitutional Court's influence on, and contribution to, the interpretation of the scope of IDP-rights. As mentioned above, the Constitutional Court

⁶⁹⁰ Ibid. paras. 108-111.

⁶⁹¹ See Inter-American Court of Human Rights, Case of the Gómez-Paquiyaury Brothers v. Peru, Judgment of July 8, 2004 (Merits, Reparations and Costs) para.72; Case of the 'Five Pensioners'. Inter-American Court of Human Rights Judgment of February 28, 2003. Series C No. 98, para. 63; Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 76, and Inter-American Court of Human Rights, Baena Ricardo Et Al. Case (270 Workers V. Panama) Competence Judgment of November 28, 2003., para. 178.

⁶⁹² Also see the case of the *Moiwana Community v. Suriname*, Judgment of June 15, 2005 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, para.17.

⁶⁹³ *Mapiripán Massacre v. Colombia*, *supra* note 379, para 165(c).

⁶⁹⁴ For instance, the IACrHR made express reference to judgment C-225/95 of May 18, 1995, issued by Constitutional Court and also to judgment T-025/04 of January 22, 2004, issued by the Third Appellate Chamber of the Constitutional Court regarding the problem of internal displacement and the duty of giving it a higher priority than many other issues on the public agenda. see *Mapiripán Massacre* case paras 174-176.

made reference to the specific principles regarding the prevention from arbitrary displacement in order to determine the scope and content of the IDP-rights. In the following years, the IACrTHR took the same approach and invoked the principles of the Guiding Principles in establishing and evaluating the content and scope of the rights related to prevention from displacement.

The contribution of the Constitutional Court's decision T-025 of 2004 on the recognition of the right not to be arbitrarily displaced is clearly demonstrated in the IACrTHR's decision, as it stated that 'the right to not be forcefully displaced within a State' was also recognized by the Constitutional Court of Colombia when it interpreted the content of the constitutional right to choose a place of residence.⁶⁹⁵ Hence, the IACrTHR took it further and explicitly stated that the right to freedom of movement and residence protects the right not to be forcibly displaced within a State Party to the Convention.⁶⁹⁶ In this sense, the decisions of both judicial bodies regarding forced displacement are not only complementary but mutually reinforcing.⁶⁹⁷ Therefore, the IACrTHR's rulings on forced displacement can be interpreted to the effect that whenever a state allows forced displacement to occur, it fails to comply with its obligations to protect its citizens' right to freedom of movement, and thus the right not to be arbitrarily displaced. This perspective would permit the integration of the protection of the right to not be a victim of forced internal displacement into the case law.

In fact, the integration of a broad range of rights makes it possible to advance the protection of new aspects or dimensions of the rights of victims of forced displacement. For instance, in the *Moiwana Community* case, there were no claims of the violation of freedom of movement neither in the petitions of representatives of the displaced indigenous people's nor in the Commission on Human Rights' petition. However, the IACrTHR stated that the Moiwana community members have suffered a 'forced eviction' from their ancestral lands and the State' acts and omissions constitute violation of the right to freedom of

⁶⁹⁵ *Case of the Mapiripán Massacre v. Colombia*, supra note 379, para 188.

⁶⁹⁶ *Case of the Ituango Massacres v. Colombia*, Judgment of July 1, 2006 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, para.207, also see *case of the Mapiripán Massacre v. Colombia*, supra note 379, para 188.

⁶⁹⁷ Rincón, T. (2009), 'The Judicial Protection of Internally Displaced Persons in Colombia: National and Inter-American Perspectives', supra note 673, p.149.

movement.⁶⁹⁸ In this case, the IACrTHR granted particular relevance to the Guiding Principles as rules for the interpretation of the content of Article 22 (freedom of movement) of the American Convention in the context of forced displacement.⁶⁹⁹ In this regard, principles relating to protection from displacement (Principles 5-9) are especially pertinent to the cases on forced displacement. The incorporation of the Constitutional Court's case law into the decisions of the IACrTHR shows that decisions of both judicial bodies regarding forced internal displacement interrelate and support each other.

Overall, the national implementation of the IDP-law in Colombia is strongly supported by the IACrTHR and the Constitutional Court in those areas where the state has failed to adopt measures that are fit to prevent the acts causing forced displacement.

The case study of Colombia helps identify the actors and the processes that were critical in the development of the right not to be arbitrarily displaced at the national level. In terms of the recognition of the right not to be arbitrarily displaced, Colombia's Early Warning Systems on the prevention from forced displacement, as well as the judicial decisions on Colombia's obligation to prevent displacement, and Colombia's national IDP Law and IDP Policy, provide clear evidence of the efforts towards the effective implementation of this right. In addition, the Constitutional Court contributed to assessing the content and the scope of the right not to be arbitrarily displaced and Colombia's responsibility in protecting this right. Therefore, Colombia's case reflects an effort towards not only the explicit recognition of this right, but also the effective implementation through the development of IDP laws and policies. For each country case, however, the path to explicit recognition and implementation of the right can be different and inclusive of a different mix of law and policies, as the second case study of Kenya will demonstrate.

5.4.6. The case of Kenya

The second country case study examined in this chapter can provide additional insights on how the right not to be arbitrarily displaced can be developed at the national level, and how such development may entail a different array of laws and policies when compared to the

⁶⁹⁸ The case of the *Moiwana Community v. Suriname*, *supra* note 375, para.112.

⁶⁹⁹ *Ibid.*, para.111.

case of Colombia. Kenya is the second country in Africa after Angola to have adopted a specific legal framework for the protection of, and assistance to, IDPs. This to some extent puts Kenya at the forefront in the protection of IDP rights. Besides that, the country is a member of the 2006 Pact in the Great Lakes Region, which includes a protocol on IDPs,⁷⁰⁰ based on the Guiding Principles. This led Kenya to establish comprehensive legal and policy frameworks as part of its efforts to implement its commitments under the binding Great Lakes IDP Protocol. Being a member state of the Great Lakes Pact and its protocol on IDP Protection indicates Kenya's acknowledgement of the problem of IDPs and its willingness to address it, but its response to the problem of internal displacement might be more effective in upholding the rights of IDPs were it to accede to the Kampala Convention.

In order to indicate an awareness of the plight of displaced people in Kenya, a national IDP Policy was drafted in 2010, outlining institutional frameworks and identifying the roles and responsibilities of both states and non-state actors, titled with 'National Policy on the Prevention of Internal Displacement and the Protection and Assistance to IDPs in Kenya' (hereinafter draft IDP Policy). However, there has been no further progress toward its adoption, and it remains simply a draft IDP Policy. Nonetheless, considering the voices from stakeholders for the need for legislation on internal displacement in Kenya to ensure the protection of IDP rights, the Kenyan government moved to adopt IDP legislation. The draft IDP policy was therefore complemented by the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (hereinafter IDP Act),⁷⁰¹ which received presidential assent on 31 December 2012. In addition to the draft IDP Policy and IDP Act, the government has introduced a number of laws and policies which, while not specific to IDPs, are relevant to the prevention and addressing of displacement, including the 2011 National Policy on Peace-building and Conflict Management⁷⁰² and the Land Act in 2012.⁷⁰³ It should be born in mind that the adoption and thorough implementation of these frameworks are fundamental to ensuring that IDPs' rights are properly protected and future displacement prevented.

⁷⁰⁰ Great Lakes IDP Protocol, *supra* note 31.

⁷⁰¹ Kenya: Act No. 56 of 2012, Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, available at: <https://www.refworld.org/docid/511219962.html>

⁷⁰² Government of Kenya, national policy on peace-building and conflict management, December 2011, available at: <http://goo.gl/Qkovlv>.

⁷⁰³ Government of Kenya, Land Act, May 2012, available at: <http://goo.gl/i4xPpr>.

The following discussion will first highlight the causes of displacement that led to Kenya's responses with the enactment of a national IDP law and policies on forced internal displacement. The analysis will then focus on the Kenyan national IDP legislation and draft IDP Policy on the situations of internal displacement and will provide a comparative assessment of Kenya's national IDP frameworks, the IDP Act and the Draft IDP Policy. The discussion will then shift to Kenya's obligation to prevent arbitrary displacement under the 2012 IDP Act and 2010 Draft National Policy, and finally, will examine limitations of the implementation on the Kenyan IDP Law regarding the prevention of displacement.

5.4.7. Overview of Internal Displacement in Kenya

Since its independence in 1963, Kenya has experienced numerous waves of internal displacement caused by complex and various reasons such as political crisis, conflicts over land between ethnic groups and pastoralists who traditionally move from one area to another in search of pasture and in search of water for their livestock, conflicts over natural resources and natural disasters. Among these given reasons that led to the internal displacement of people in Kenya, the worst incidence of internal displacement took place following the disputed presidential elections of December 2007, when an estimated 670,000 people fled their homes and around 1,300 were killed.⁷⁰⁴ The violence associated with 2007 that election was a defining moment in the evolution of Kenya's response to internal displacement, because the Kenyan government adopted measures specifically design to protect and assist IDPs for the first time, as the scope and magnitude of the violence-led internal displacement was highly visible. However, this was not the first time the country had experienced violence-induced displacement; Kenya has had a long history of forced displacement linked to conflicts over land among different ethnic groups particularly in the Rift Valley.⁷⁰⁵ Generalised violence has continued since the early 1990s between members of ethnic groups over land, whereby people associated with rival political opinion are

⁷⁰⁴ OHCHR (2012), Report of the Special Rapporteur on the human rights of internally displaced persons, mission to Kenya, available at: <http://goo.gl/Fvuoyf>.

⁷⁰⁵ IDMC and NRC's Report (2012), 'Kenya, IDPs' significant needs remain as intercommunal violence increases', available at: <https://www.internal-displacement.org/publications/kenya-idps-significant-needs-remain-as-intercommunal-violence-increases>, p.3.

labelled 'outsiders' and violently ejected from their farms.⁷⁰⁶ Once the land owners have been forced to flee from their homes, they generally decide to sell or exchange their land and migrate permanently from ethnically heterogeneous regions to safer areas. As a result, they have no choice left but to become IDPs.

Apart from political violence and inter-communal ethnic clashes, internal displacement in Kenya is caused by natural disasters such as drought and floods, as well as development and environmental protection projects, such as eviction of indigenous people from forests across Kenya to conserve the environment without viable alternatives, which significantly increases internal displacement every year.⁷⁰⁷ According to the Internal Displacement Monitoring Centre (IDMC), natural disasters have also displaced around 336,000 people since the beginning of 2019.⁷⁰⁸ Moreover, discoveries of oil and other minerals in the Turkana district of Rift Valley have led to grievances and tensions among local communities, as they were not consulted prior to exploration, and they fear displacement without compensation or viable alternatives.⁷⁰⁹

Despite experiencing several large waves of internal displacement, the government's overall response was fragmented and lacked a special focus on IDPs. Interventions were consequently mostly ad hoc and not necessarily focused on IDPs. In the aftermath of the 2007/2008 violence that triggered large-scale displacement, the government had some basic mechanisms in place for responding to internal displacement with the support of international organisations. The UN has deployed the 'cluster approach'⁷¹⁰ in Kenya in order to provide an effective response to the needs of people displaced by post-election violence and then assisted the Kenyan government to overcome structural challenges and to successfully develop a comprehensive bill on internal displacement. In this regard, Kenya

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid. p.4.

⁷⁰⁸ IDMC, country profiles: Kenya, available at: <https://www.internal-displacement.org/countries/kenya> [last visited 15 March 2020]

⁷⁰⁹ IDMC and NRC's Report (2012), 'Kenya IDPs' significant needs remain as intercommunal violence increases', *supra* note 705, p.4.

⁷¹⁰ The Cluster Approach is used for coordinating in non-refugee humanitarian emergencies. Humanitarian organisations have agreed to lead certain clusters at global level. Clusters are groups of humanitarian organizations, both UN and non-UN, in each of the main sectors of humanitarian action and they have clear responsibilities for coordination. At global level, UNHCR leads the protection cluster. For a detailed information see UNHCR's Emergency Handbook, Cluster Approach (IASC) available at: https://emergency.unhcr.org/entry/41813?lang=en_US

represents a good example of international involvement in the IDP-specific law-making process. The IDP Act was eventually adopted in December 2012.

5.4.8. Legal and Policy Frameworks for Protection of IDP-rights in Kenya

Compared with Colombia, Kenya was late to respond to the needs of IDPs, especially when we consider Kenya's history of numerous waves of internal displacement. With delays and loopholes in the Kenyan government's action proving its inadequacy, the idea of a comprehensive national IDP framework to provide coordination in responding to instances of internal displacement started to gain increasing support. In this regard, there are five important steps identified in Kenya's efforts to address IDP-related issues. First, the establishment of the Kenya National Commission on Human Rights (KNCHR) through the Kenya National Commission on Human Rights Act in 2002. Although, KNCHR's mandate is not specific to the protection of IDP-rights, its mandate is to enhance the promotion and protection of human rights of all Kenyan civilians, the government supports the efforts of KNCHR to integrate internal displacement into its work, especially in its annual report to the National Assembly.⁷¹¹ KNCHR plays a large and important role in protecting and promoting the human rights of IDPs and holding the government accountable through its advocacy work.⁷¹² Second, Kenya became a party to the Great Lakes Pact and its protocols in 2006.⁷¹³ The Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons commits member states to enact national legislation to domesticate the Guiding Principles into their legal frameworks for implementation within national legal systems.⁷¹⁴ Third, the establishment of an institutional framework for addressing internal displacement with the Ministry of State for Special Programs (MoSSP) in 2008, which indicates the government of Kenya's acknowledgement of the existence of IDP-issues. The government did not officially

⁷¹¹ National Human Rights Institutions Forum, Kenya (www.nhri.net/NationalData.asp?ID=95).

⁷¹² IDMC, Kenya: No Durable Solutions for Internally Displaced Yet, December 2008, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/4A0A0E545D0CDEDEC12575280038B842-Full_Report.pdf, p.80.

⁷¹³ Pact on Security, Stability and Development in the Great Lakes Region comprises five elements: the 2004 Dar es Salaam Declaration on Peace, Security, Democracy and Development, ten Regional Protocols (two of them specific to displaced persons), Regional Programs of Action, the Special Reconstruction and Development Fund, and a Regional Follow-Up Mechanism.

⁷¹⁴ Great Lakes IDP Protocol, *supra* note 31, Article 6(3).

recognise the presence of IDPs until the violence-led internal displacement during the 2007/2008 presidential election, which brought about a clear recognition of the problem and resulted in the government establishing, for the first time, the national institution entrusted to provide a response to the needs of IDPs and to guarantee their protection. Fourth, the development of a national policy on the Prevention of Internal Displacement and the Protection and Assistance to IDPs in Kenya in 2010 provides comprehensive guidelines for responding to all categories of IDPs in all phases of displacement. Unfortunately, although the draft IDP Policy was endorsed by the cabinet in October 2012, there has been no subsequent progress towards its final adoption. Fifth, the adoption of the IDP Act in 2012 is an important step toward implementing Kenya's obligations under the Great Lakes Protocol. The IDP Act and the Draft IDP Policy constitute the two important pillars of Kenya's national framework, and therefore need to be assessed in detail, as the following section will show.

5.4.9. A Comparative Assessment of the Kenya's National IDP Frameworks (IDP Act - Draft IDP Policy)

When examining the two key pillars of Kenya's national IDP framework, it is first necessary to analyse the content of these national instruments. The draft IDP Policy in Kenya provides a comprehensive approach to addressing internal displacement; it covers all phases of displacement and all causes of displacement by adopting the Guiding Principles' definition of IDPs.⁷¹⁵ The 2012 IDP Act also replicates the descriptive definition of 'internally displaced person' contained in the Guiding Principles.⁷¹⁶ In this regard, at least on paper, Kenya's national IDP framework covers a broad range of IDPs in its definition compared to the Colombian national framework, which only covers conflict-induced IDPs. In addition, the draft IDP policy goes further and makes the definition more Kenya-specific, by explicitly specifying that the definition of IDPs includes inter-communal hostilities such as competition over lands or other resources and projects on the preservation of the

⁷¹⁵ Draft National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons (IDPs) in Kenya, August 2011, (hereafter Draft IDP Policy) Section 2, para.5.

⁷¹⁶ Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, (hereafter IDP Act) Section 2(1).

environment.⁷¹⁷ Adopting a comprehensive definition of IDPs in domestic law or policy is fundamental, as it can help state and humanitarian organisations or other stakeholders to assess and identify those persons in need of protection and assistance and, accordingly, to apply any relevant specific laws and policies relating to internal displacement. It also helps to clarify the scope of the national framework. If a national IDP framework includes all causes of displacement in the IDP definition such as natural disaster, development projects, conflict or man-made disasters as specified in the Guiding Principles, then the scope of the framework is designed to address problems of IDPs caused by all these reasons. For instance, Kenya's IDP Policy provides a separate list of measures to be taken by the Kenyan government for each reason given in the IDP definition that triggers their displacement. In this way, this also helps public officers, humanitarian organisation or donors who to consider as an IDP, as well as what kind steps need to be taken for their protection and assistance. However, in practice, it seems that the comprehensive definition in Kenyan national framework is not always taken into consideration as the government response to internal displacement varies in different cases. For instance, the government has focused on those displaced by the post-election violence of 2007/2008, while the situation of people displaced by earlier or subsequent violence or by other causes has not been adequately addressed.⁷¹⁸ Hence, while Kenya has a broader IDP definition than Colombia on paper, in practice both countries show some similarities as they have both focused on conflict or violence-induced IDP groups. In these situations, it is imperative to include training and awareness-raising clauses in the national frameworks to understand what circumstances constitute internal displacement, thereby assisting in reducing discrimination against IDPs. Both the Kenyan IDP Act and draft IDP Policy include awareness-raising of the understanding of why IDPs may need special assistance in certain circumstances. Part IV of the IDP Act is dedicated to the issue of 'Public Awareness, Sensitisation, Training and Education', and draft IDP Policy contains a specific objective: 'the creation of a common understanding in Kenya of who an IDP is.'⁷¹⁹ In this sense, awareness-raising of IDP-specific needs is a way to officially acknowledge the existence of internal displacement and the rights of IDPs.

⁷¹⁷ Draft IDP Policy, Section 2, para.6.

⁷¹⁸ IDMC and NRC's Report (2012), *supra* note 705, p.9.

⁷¹⁹ Draft IDP Policy, Introduction, Objective 2.

In addition, it is important to include a non-discrimination clause in the national IDP framework. Like in Colombia's IDP Law and policy, Kenya has included a non-discrimination clause in both instruments. After many people were displaced by the post-election violence of 2007/2008, many IDPs have felt that their government has neglected them and therefore felt discriminated against.⁷²⁰ In order to overcome these challenges, the draft IDP policy contains detailed provision on discrimination, such as IDPs 'shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced' or '[a]ll IDPs shall enjoy the same assistance and protection in full equality and without discrimination'.⁷²¹ Unlike the detailed provision on the prohibition of discrimination in the draft IDP Policy, the IDP Act contains only passing references to discrimination. For example, Section 9(2) on durable solutions provides that there should be 'enjoyment of an adequate standard of living without discrimination'.⁷²² The prohibition of discrimination against IDPs is particularly important given that the one of the instances of displacement in Kenya is rooted in the inter-communal violence which is likely to result in intentional discrimination against certain groups.

The IDP Act establishes an institutional framework outlining the roles and responsibilities of government for the protection of IDP rights, in particular by providing for the establishment of the National Consultative Coordination Committee (NCCC), which is mainly responsible for the effective implementation of the IDP Act.⁷²³ An institutional framework has also been established with the draft IDP Policy, outlining the roles of relevant stakeholders, including the government, community-based organisations and regional institutions such as the African Union.⁷²⁴

The draft IDP Policy includes three significant topics that are neither provided for in the Kenyan IDP Act nor in the Colombian national IDP frameworks. Firstly, it imposes an obligation on non-state armed groups to respect the rules of IHL in cases of armed

⁷²⁰ For instance, in an interview with a displaced woman at the Pipeline IDP Camp in Nakuru, she said that 'I am in the tent because I voted; why should I vote if it means this?', cited from Kamungi, P. (2016). 'National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya', *Brooking Internal Displacement Project*, p.249.

⁷²¹ For the full text see Draft IDP Policy, Chapter 1.2.

⁷²² See 2012 IDP Act, Section 9(2)(c) and (i).

⁷²³ For the full list of the functions of NCCC, see 2012 IDP Act, Part-III (Administration), para. 13.

⁷²⁴ Draft IDP Policy, Chapter 3: Institutional Framework, Roles and Responsibilities.

conflict.⁷²⁵ Moreover, the draft IDP Policy goes even further and provides for criminal responsibility of non-state-actors for acts of arbitrary displacement and other violations of the human rights of IDPs.⁷²⁶ Thirdly, it provides for cooperation with the international community in the implementation of this policy as ‘the Government shall seek support and cooperate with members of the international community, including humanitarian, development and human rights actors, in the implementation of this Policy, in particular in circumstances overwhelming national capacities to provide adequate protection and assistance to IDPs.’⁷²⁷ It is assumed that the inclusion of many aspects of the IDP-related issues and different alternatives to address them in the Kenyan national IDP framework are the outcomes of the participation of a variety of stakeholders in the drafting process. The Kenyan government invited and accepted assistance from the international community, including UNHCR, IDMC, the Special Rapporteur on the Human Rights of IDPs, the Kenya National Commission on Human Rights, the Kenya Red Cross Society and the Protection Working Group on Internal Displacement.⁷²⁸ In this respect, Kenya is a good example of State cooperation with the international community to overcome structural challenges and to develop a comprehensive IDP framework. Kenya’s cooperation with humanitarian organisations still functions well, or at least there have been no intentions observed from the Kenyan government to hinder humanitarian assistance to displaced populations from humanitarian organisations. UNHCR’s Office in Nairobi seeks to develop a system for monitoring IDP communities which includes population movement monitoring and a collection and processing of information, in order to ensure that protection concerns of displaced persons are adequately addressed, and this monitoring system functions with the partnership of government institutions, especially with the Ministry of Interior and Coordination and the Ministry of Health.⁷²⁹ Some of the leading organisations in the field of migration, such as International Organization for Migration (IOM) and United Nations Office for the Coordination of Humanitarian Affairs (OCHA) have offices in Kenya and work in

⁷²⁵ Draft IDP Policy, Chapter 3, para.38.

⁷²⁶ Draft IDP Policy, Chapter 3, para.38(d).

⁷²⁷ Draft IDP Policy, Chapter 3, para.32.

⁷²⁸ The protection working group on internal displacement (PWGID) was established in 2009 to replace the protection cluster as the coordinator of humanitarian assistance in Kenya.

⁷²⁹ UNHCR Partners in Kenya, Official website of the UNHCR, available at : <https://www.unhcr.org/ke/unhcr-partners-kenya>

coordination with UNHCR at the operational level to address assistance and protection needs of displaced people.⁷³⁰

As can be seen from the above, both national instruments have covered many aspects of internal displacement; however, the prevention of internal displacement in Kenya needs further assessment with reference to particular obligations that emerge from these national frameworks, and especially obligations related to the prevention of arbitrary displacement.

5.4.10. Kenya's obligation to prevent arbitrary displacement under the 2012 IDP Act and 2010 Draft National Policy

Primarily, Kenya's national responsibility to prevent internal displacement and, therefore, the responsibility to protect IDPs' right not to be arbitrarily displaced, arises from the Great Lakes IDP Protocol, which commits member states to 'prevent arbitrary displacement and to eliminate the root causes of displacement'.⁷³¹ From a protection point of view, the obligation of protection from displacement placed on the state is indeed the corner stone of the domestic framework that both the draft IDP Policy and the IDP Act seek to establish. They begin by referring to the Guiding Principles and the Great Lakes IDP Protocol as the basis of Kenya's obligation to protect IDPs. In this regard, integration of the Guiding Principles in Kenya's national normative framework is the clearest indication that, in line with Principle 3 of the Guiding Principles, the Kenyan authorities accept that they are the primary duty bearers and responsible for protection of IDPs from being displaced within their jurisdiction. This responsibility is found in Article 6(1) of the IDP Act, which provides that 'the Government shall protect every human being against arbitrary displacement' and Article 48 of the draft IDP Policy, which states that 'the Government recognizes, respects and ensures respect for the right of every human being to be protected against being arbitrarily displaced from his or her home or place of habitual residence.'

These articles reflect a human rights-based approach; they afford protection to 'every human being' irrespective of their nationality, sex, religion, ethnic origin and even political

⁷³⁰ For further information visit <http://kenya.iom.int/about-iom-kenya>, <https://www.unhcr.org/ke/unhcr-partners-kenya>, <https://www.unocha.org/southern-and-eastern-africa-rosea/kenya>

⁷³¹ Great Lakes IDP Protocol, Article 3(1).

persuasion. Furthermore, Kenya has one of the rare legal frameworks that criminalise the arbitrary displacement of IDPs.⁷³² Although, in the IDP Act, the elements of arbitrary displacement are not specified in detail as in the draft IDP Policy, Article 6(2) of the IDP Act makes explicit reference to Principle 6(2) of the Guiding Principles, which provides the list of acts that can be considered as arbitrary displacement. Therefore, when we read this Article 6 in conjunction with Principle 6, there are four main aspects of the responsibility of protection from arbitrary displacement created: first, displacement should be avoided wherever possible.⁷³³ Second, if displacement is unavoidable, Kenya needs to justify any displacement arising out of conflict, natural disaster or large-scale development projects by reference to possible justifiable reasons for it, such as imperative military reasons, health or safety of IDPs.⁷³⁴ Third, Kenya must investigate feasible alternatives to minimise the adverse consequences of the displacement, such as providing habitable sites with satisfactory conditions of hygiene, nutrition and health.⁷³⁵ The final aspect is the notion of IDP participation. Kenya is required to provide information relating to the displacement to IDPs, and allow for effective management of their relocation.⁷³⁶ In light of the referred content of the Principle 6, the IDP Act provides that Kenya's primary responsibility is to prohibit arbitrary displacement and penalise arbitrary displacement under circumstances in which it amounts to a crime against humanity or war crime in accordance with the Rome Statute of the International Criminal Court and the International Crimes Act 2008.⁷³⁷ The IDP Act further provides that any person who commits an offence under the IDP Act is liable to a fine or to imprisonment or to both such fine and imprisonment.⁷³⁸

The draft IDP Policy provides detailed provisions on protection against arbitrary displacement. Kenya's responsibility to prevent internal displacement is identified in three stages: (i) the prevention of future displacement, (ii) protection from arbitrary displacement and (iii) preparedness and mitigation of the adverse effects of internal displacement. Due to

⁷³² As of 2020, only three countries' national IDP frameworks criminalise the acts of arbitrary displacement. These countries are, in addition to Kenya, Philippines and Iraq.

⁷³³ Principle 6(1) of the Guiding Principles.

⁷³⁴ Principle 6(2) of the Guiding Principles; also see Article 17(1) of the Protocol Additional to the Geneva Conventions, 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

⁷³⁵ Principle 7(1) of the Guiding Principles.

⁷³⁶ Principle 7(3) (c) and (d) of the Guiding Principles.

⁷³⁷ Article 23 (1) of the IDP Act.

⁷³⁸ Article 23 (3) of the IDP Act.

the complexity, as well as uncertainty, in predicting future displacement, IDP frameworks generally focus on the existing situations of internal displacement. In this regard, Kenya's national policy highlights the importance of avoiding conditions that have the potential of resulting in the displacement of persons. Hence, in order to prevent acts of arbitrary displacement, the draft IDP Policy also includes criminal responsibility for arbitrary displacement amounting to an international crime according to the Rome statute of the ICC and the International Crimes Act 2008.⁷³⁹

As in the IDP Act, the draft IDP Policy also explicitly recognises IDPs' right not to be arbitrarily displaced,⁷⁴⁰ and then basically replicates the substance of Principle 6 of the Guiding Principles on what amounts to arbitrary displacement.⁷⁴¹ What is different in the draft IDP Policy is that, in addition to the general provisions dealing with the state's obligation to prevent arbitrary displacement as specified in Principle 6, it highlights Kenya's responsibility to protect IDPs from arbitrary displacement in some situations considered specific to Kenya. For instance, displacement associated with post-election violence a defining characteristic of Kenya's internal displacement. For this reason, it criminalises the 'use of hate speech' and makes the government responsible for preventing violence and displacement by monitoring, investigating, prosecuting and punishing hate speech.⁷⁴² Furthermore, this draft IDP Policy provides a detailed list of measures that need to be taken in order to prevent future displacement triggered by armed conflict or other violence and natural disasters or human-made disasters.

Social issues, and ways to cope with them, are also covered in the draft IDP Policy, ranging from poverty and unemployment to public awareness campaigns and civic education.⁷⁴³ This aspect of the Kenyan IDP policy is unique compared with other adopted national IDP policies in the world because it is the only instrument that highlights the importance of building and enhancing the capacity of individuals and communities to increase their resilience to displacement. Unlike most national IDP frameworks that focus on the assistance and return of IDPs, the prevention of displacement is extensively covered in both

⁷³⁹ Chapter 5, Article 53 of the draft IDP Policy

⁷⁴⁰ Article 48 of the draft IDP Policy

⁷⁴¹ Article 49 of the draft IDP Policy

⁷⁴² Article 45 (b) (ii) of the draft IDP Policy; also see section 5.3 Accountability, Criminalization and Addressing Impunity for Acts of Arbitrary Displacement, Article 52 of the draft IDP Policy

⁷⁴³ See Chapter 4: Preventing Internal Displacement, Articles 41-47 of the draft IDP Policy

Kenya's IDP Act and in the draft IDP Policy. Kenya's obvious indication of its acknowledgement of the responsibility to protect IDPs against arbitrary displacement is the establishment of an Early Warning System, as in the case of Colombia. Indeed, with their Early Warning Systems, Colombia and Kenya include measures that go beyond the Principles dealing with the prevention of displacement in of the Guiding Principles. The Colombian and Kenyan frameworks elaborate on the general guidance of the Guiding Principles on prevention of arbitrary displacement by specifying additional actions, in their case it is the development of early warning systems, that authorities should take to prevent displacement. In this respect, for example, the IDP law and IDP policy in Kenya, in addition to prohibiting arbitrary displacement, creates a prevention mechanism charged with monitoring and reporting on populations at risk of displacement that issues early prevention warnings to relevant government authorities.⁷⁴⁴ Ultimately, this creates an obligation on the state to prepare for emergencies and ensuing internal displacement.

Actually, the steps to prevent arbitrary displacement in Kenya had been taken even before the national IDP frameworks. As a member state of the Inter-Governmental Authority on Development (IGAD),⁷⁴⁵ Kenya is a signatory to the Protocol on the Establishment of a Conflict Early Warning and Response Mechanism (CEWARN) for IGAD Member States. In order to promote the exchange of information and collaboration among member states,⁷⁴⁶ the CEWARN was established in 2002 by this Protocol.⁷⁴⁷ The main functions of CEWARN are to create and manage databases on information for early warning and response and to set standards and develop common practices for information collection and reporting on conflict early warning.⁷⁴⁸ In addition to the IGAD initiative, the government has its own national CEWARN. It coordinates early warning and early response efforts through members of the early recovery cluster and a network of field monitors who issue situation reports, incident reports and alerts.

⁷⁴⁴ IDP Act, Article 7 (Preparedness and Mitigation); IDP Policy, Chapter 6, Article 61(d).

⁷⁴⁵ IGAD was created to mitigate the effects of the recurring severe droughts and other natural disasters that resulted in widespread famine, ecological degradation and economic hardship in the region. For a detailed info visit <https://igad.int/>

⁷⁴⁶ Member states are Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda.

⁷⁴⁷ Article 2 of the Protocol on the Establishment of a Conflict Early Warning and Response Mechanism

⁷⁴⁸ Article 7 of the Protocol on the Establishment of a Conflict Early Warning and Response Mechanism

In terms of addressing conflict-induced displacement, after the 2007/2008 election violence, the National Cohesion and Integration Commission was established to monitor hate speech and mobilisation for political violence, and therefore to prevent violence and displacement.⁷⁴⁹ Furthermore, the Kenyan government welcomed joint initiatives from the international community, such as joint initiatives with government, UN and NGOs, in the area of prevention of internal displacement. International involvement to address the root causes of conflict-induced displacement in the Rift Valley is one example of this. Kenya National Commission of Human Rights, the UN Children's Fund (UNICEF) and the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) established coordination offices in the Rift Valley and western provinces which are considered 'hot spots of violence'. The coordination centres are mandated to respond to any incidents of violence while the monitors are to address issues such as family separation and tracing of missing persons, denial of access to assistance and provision of assistance or services, as well as forced movement.⁷⁵⁰ Although, The Truth, Justice and Reconciliation Commission was not established specifically to address the prevention of internal displacement under the Kenya's early warning system, this Commission should also be included, as part of Kenya's efforts to prevent or minimise the extent and impact of internal displacement, as it is mandated to inquire into abuses of human rights violations, including cases of forced displacement,⁷⁵¹ and therefore has the potential to strengthen human rights protection and to reduce the risk of such violations being repeated.

The IDP Act and draft IDP Policy are not the only instruments that deal with displacement in Kenya. In recent years, the government of Kenya has produced a number of policies and laws that are relevant in terms of preventing and addressing displacement, even if they are not IDP-specific. These instruments are mostly relevant to the prevention of, and response to, displacement caused by natural disasters rather than conflict. For instance, in 2009, the government developed the draft Kenya National Disaster Management Policy which provides an early warning system for situations that may result in disasters, as well as

⁷⁴⁹ See the full list of functions of the National Cohesion and Integration Commission at <https://cohesion.or.ke/index.php/about-us/functions-of-the-commission>

⁷⁵⁰ Kamungi, P. (2016), 'National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya, *supra* note 720, p.235.

⁷⁵¹ Truth, Justice, and Reconciliation Commission, 'Act and Amendments (TJRC) - TJRC Act 2008' (2008). I. Core TJRC Related Document 26, Article 6.

measures to alleviate suffering by providing timely and appropriate response mechanisms for disaster victims.⁷⁵² Moreover, Kenya's Vision 2030, the long-term development blueprint for the country, articulates the commitment to 'enhance disaster preparedness in all disaster-prone areas and improve the capacity for adaptation to global climatic change'.⁷⁵³ In relation to this commitment in Kenya's Vision 2030, the Kenyan government has produced frameworks that govern disaster management, such as the National Disaster Response Plan and the National Climate Change Response Strategy.

In addition to the instruments that govern disaster management, a number of other instruments aim to prevent internal displacement. For instance, Kenya has also made significant progress in developing a comprehensive land-related framework, which again is very relevant to address displacement. It adopted a national land policy in 2009 and a series of new laws in 2012.⁷⁵⁴ Even if these instruments not specific to displacement refer to the act on IDPs, they outline safeguards against arbitrary eviction or forced displacement of populations which is important to strengthen protection of the IDPs against arbitrary displacement.

In accordance with the above explanations on the content of Kenyan national legislation regarding the prevention of displacement, the previously mentioned three benchmarks to decide the comprehensiveness of national IDP frameworks (prevent displacement and minimize its adverse effects (Benchmark 1), create a legal framework for upholding the rights of IDPs (Benchmark 5) and developing a national policy on internal displacement (Benchmark 6), and can be found in Kenya's IDP frameworks. Scrutiny of those articles dealing with the prevention of displacement reveals that Kenyan national IDP legislation includes all three steps, therefore considered as a comprehensive IDP framework in terms of prevention of displacement, as it creates a legal framework for upholding the right not to be forcibly displaced with Article 6 of the IDP Act (Benchmark 5). Indeed, the very adoption of the IDP Act represented a substantial achievement for upholding IDP rights in general. Following from this point, what needs to be considered here is whether the right not to be

⁷⁵² National Policy for Disaster Management in Kenya, March 2009. p.4, available at: <https://www.ifrc.org/docs/idrl/1058EN.pdf>

⁷⁵³ Republic of Kenya, Kenya Vision 2030: The Popular Version (2007), Nairobi, *Government Printer*, p.19.

⁷⁵⁴ These laws are the Land Act, the Land Registration Act and the National Land Commission Act, Resettlement Procedures Bill and the Community Land Bill.

arbitrarily displaced is a legally enforceable right or not. The IDP Act provided that the way to deal with forced displacement is to acknowledge forced internal displacement as a human rights issue, therefore recognising IDPs' right not to be arbitrarily displaced and criminalising the acts of forced displacement. Its purpose is to ensure that the Kenyan government lives up to the expected international standards of protection for IDPs; Kenya is obligated under the IDP Act to be bound by the applicable rules of international human rights and humanitarian law.⁷⁵⁵

As nationals of Kenya, IDPs are direct beneficiaries of human rights and constitutional guarantees. In this respect, this right can be enforced by Kenya's National Human Rights Institution, KNCHR, on behalf of displaced populations. KNCHR's function, to report on the government's implementation of national IDP legislation and its compliance with international treaty obligations is recognised in the IDP Act,⁷⁵⁶ therefore its role to hold the government accountable through its advocacy work is also recognised. In this way, KNCHR promotes and protects the rights of IDPs by handling individual complaints or facilitating access to legal remedies by IDPs. Moreover, Kenya is a state party to the principal human rights instrument in the African region, the African Charter on Human and Peoples' Rights (African Charter),⁷⁵⁷ which established the African Commission on Human and Peoples' Rights (ACmHPR).⁷⁵⁸ The ACmHPR is entitled to submit cases to the African Court on Human and Peoples' Rights (AfCHPR),⁷⁵⁹ and, by lodging their complaints to the ACmHPR, IDPs can seek remedies denied by the authorities. In fact, ACmHPR is the only way to refer IDP cases to the AfCHPR, because Kenya has not recognised the competence of the AfCHPR to receive cases from NGOs and individuals.⁷⁶⁰ Indeed, there have been some cases concerning the displacement of Kenyan IDPs referred to the AfCHPR by the ACmHPR. However, in the case

⁷⁵⁵ IDP Act, Article 76 (a) states that: "The Government shall respect and protect the right to liberty of movement and freedom to choose one's residence of all IDPs in accordance with the Constitution, regional and international human rights and humanitarian law standards without discrimination. This includes: 'a) The right to move freely in and out of camps or other settlement [...]"

⁷⁵⁶ IDP Act, Section 3.3, Article 23.

⁷⁵⁷ African (Banjul) Charter On Human And Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

⁷⁵⁸ Ibid. Chapter II, Articles 30-44.

⁷⁵⁹ See Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights

⁷⁶⁰ AfCHPR can only consider and determine individual cases where the matter involves states which made specific declarations and accepted its jurisdiction over individual communication. See official website of the AfCHPR at : <https://en.african-court.org/>

dealing with the eviction of an indigenous community, the Ogiek Community,⁷⁶¹ from a forested area in Kenya, no explicit mention was made by the AfCHPR to the right not to be arbitrarily displaced, because this right is not explicitly recognised under the African Charter. Instead, the AfCHPR decided that Kenya violated the displaced indigenous community's right to freedom of movement (Article 12), among others,⁷⁶² under the African Charter,⁷⁶³ but it is acknowledged by the HRC in its General Comment 27, while defining the content and scope of the freedom of movement and residence that the right to freedom of movement and residence includes protection against forced internal displacement⁷⁶⁴, therefore includes IDPs' right to be protected from arbitrary displacement. Unlike in its ruling in the *Mapiripán Massacre v. Colombia case*, the AfCHPR did not grant particular relevance to the Principles dealing with the prevention of arbitrary displacement in the Guiding Principles as rules for the interpretation of the Article 12. In fact, the AfCHPR has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of African Charter and any other relevant human rights instruments including Kampala Convention ratified by the state concerned. Therefore, if the Kampala Convention was ratified by Kenya, it would have set a broader path to the AfCHPR to evaluate the acts of forced displacement, arbitrary eviction and movement-related rights of displaced population. The reason of this assumption is that the Kampala Convention is the only regional legally binding instrument that explicitly recognises IDPs' right not to be arbitrarily displaced and imposes obligation on states to take steps to protect this right. Therefore, the AfCHPR could take into consideration the violation of the right not to be arbitrarily displaced in Kenya.

Furthermore, in order to effectively implement government policies on internal displacement, a national policy for IDP protection was developed, outlining the responsibilities of national authorities in line with their obligations (Benchmark 3). However, as a recommendation for normative action, draft IDP Policy's final adoption is urgently needed. As discussed throughout this chapter, there are certain areas where the draft IDP

⁷⁶¹ See *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9, available at: https://en.african-court.org/images/Publications/English_Law_Reports_18_Feb_2020.pdf

⁷⁶² Other violated rights are Articles 1, 2, 4, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights; *ibid.* para.101.

⁷⁶³ *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017), para.103.

⁷⁶⁴ HRC General Comment 27, *supra* note 358, para.7.

Policy complements the IDP Act and fills the gaps with a more Kenya-specific perspective, such as criminalising hate speech, articulating the responsibilities of non-state parties, including inter-communal hostilities and projects on the preservation of the environment in the IDP definition, providing a detailed list of measures that need to be taken in order to prevent future displacement and containing a detailed provision on non-discrimination of IDPs. In this way, adoption of it would help to facilitate implementation of the IDP Act by articulating the roles of the state, non-state actors and other stakeholders and detailed measures to be taken to uphold IDPs' rights. One commentator points out that as both Kenyan Constitution and draft IDP Policy was pending adoption in the year 2010, there was a general perception in the parliament that adoption of a national policy was not a priority compared with more urgent legislation that needs to be passed for timely implementation of the new constitution.⁷⁶⁵ Unfortunately, it seems that when the political situation stabilised, IDP issues became less of a priority, so the adoption of the IDP Policy has yet to be prioritised over the ten year-period. The failure to adopt a national policy on internal displacement that articulates government action and substantiates IDPs' rights may also continue to hamper an effective response and implementation of Kenya's national IDP framework.

Finally, both the IDP Act and draft IDP Policy placed a particular emphasis on preventing arbitrary displacement, with specific measures elaborated for avoiding the conditions that cause displacement and minimizing displacement's adverse effects by establishing a mechanism for coordination (CEWARN) of the imminent response to internal displacement (Benchmark 1). In this regard, Kenya's national IDP framework includes, at least on paper, all the instances of previously mentioned benchmarks in order to increase the effectiveness of the government's response to the prevention of internal displacement. Overall, it can be concluded that Kenya has developed a relative advanced national IDP framework, although in practice there are some limitations that Kenya urgently needs to overcome.

⁷⁶⁵ Kamungi, P. (2016), 'National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya', *supra* note 720, p.233.

5.4.11. Limitations of the Implementation on the Kenyan IDP-Law Regarding the Prevention of Displacement

Despite significant progress towards developing a legal and policy national framework on internal displacement, the government's response needs to demonstrate greater consistency and improvement. First of all, the delay in establishing the NCCC is of great concern, because this is to be the main body responsible for implementing the IDP Act. NCCC only became operational in 2015 and the scope of NCCC's activities has still not been comprehensively defined, nor have its relationships with ministries, entities working in the areas of disasters and land.

Another limitation is the lack of clarity in the demarcation of administrative responsibilities. For instance, Article 11(1) of the IDP Act reads: 'the national Government shall bear ultimate responsibility for the administrative implementation of this Act'. At the same time, Article 11(3) reads, 'County Governments shall bear responsibility for the administrative implementation of the provisions of this Act...'. According to these provisions, the central government and the county government have overlapping mandates for the implementation of the IDP Act; as a result they have been uncoordinated. These are the some of the reasons of why the implementation of the IDP Act is still in its early stages eight years after its adoption. Furthermore, the Kenyan government has focused so far on those displaced by the post-election violence of 2007 and 2008.⁷⁶⁶ Despite the comprehensive definition of IDPs in the IDP Act, there seems to be a stronger emphasis placed on politically- or election-induced internal displacement than, for example, victims of natural disasters in responses of the Kenyan authorities. Indeed, as pointed out by one commentator, the focus on the victims of post-election violence is also the case in the academic literature.⁷⁶⁷ Due to the exclusion, or ignorance, of many other categories of IDPs, the early prevention system cannot effectively respond to the forced displacement of other IDPs or potential causes that might led to new displacement waves.

⁷⁶⁶ IDMC and NRC's Report (2012), *supra* note 705, p.5; IDMC &NRC (2015), 'A review of the normative framework in Kenya relating to the protection of IDPs In the context of the Kampala Convention and other supranational frameworks' p.20; Kamungi, P. (2016), 'National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya', *supra* note 720,p.240.

⁷⁶⁷ For further discussion see Juma, L. (2013), 'An Overview of Normative Frameworks for the Protection of Development-Induced IDPs in Kenya', *African Journal of Legal Studies*, Volume 6: Issue 1, p.20.

In order to understand and identify what might lead to internal displacement, and therefore to apply CEWARN for it, KNCHR's annual report plays a complementary role in assessing the human rights of IDPs and situations leading to their arbitrary displacement. It is obliged to submit an annual report to the National Assembly that includes an 'overall assessment of the performance of the government in the field of human rights' under the Kenya National Commission on Human Rights Act.⁷⁶⁸ The draft IDP policy identifies the KNCHR as the government's chief agency for promoting and protecting the human rights of IDPs.⁷⁶⁹ However, an interview with the deputy secretary of the KNCHR revealed that no annual report has ever been discussed by the National Assembly.⁷⁷⁰ If the root causes of displacement and reasons for the violation of IDP rights are not addressed, the failure of the effective implementation of early warning systems in Kenya seems unavoidable.

Despite having a comprehensive national framework for addressing all phases of displacement, the government has focused on return processes at the expense of finding durable solutions, and it initiated a programme called Operation Rudi Nyumbani (Return Home) to assist the return of displaced people. However, this programme had several shortcomings. For example, resettlement and return efforts by the government have mostly focused on registered IDPs, so in this case registered IDPs includes only those displaced by post-election violence, while the situation of people displaced by earlier or subsequent violence or by other causes has not been adequately addressed. It has been reported by the UNHCR that substantial numbers of IDPs have ended up in transit sites and urban areas, and they have not necessarily returned to their former homes, due to lingering insecurity and lack of social cohesion.⁷⁷¹ It seems that the government policy is highly focused on having fewer registered IDP numbers with the return programme, without any strategy for the attainment of durable solutions. This creates protracted displacement and makes IDPs less visible. As a result, as donors witness large numbers of IDPs remain displaced for years

⁷⁶⁸ Kenya National Commission on Human Rights Act No. 14 of 2011, Article 54(1), available at: <https://www.refworld.org/pdfid/45d5a13c4.pdf>

⁷⁶⁹ Draft IDP Policy, Chapter 3, Articles 23-24.

⁷⁷⁰ 'No annual report has ever been discussed by the National Assembly. The KNCHR does not know why the reports have not been discussed, but it has continued to submit its reports.' Interview with the deputy secretary of the KNCHR, 2011, cited from Kamungi, P. (2016), 'National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya', *supra* note 720, p.246.

⁷⁷¹ See UNHCR (2008), 'Lessons Learned from UNHCR's Emergency Operations for IDPs in Kenya,' available at: www.unhcr.org/publ/RESEARCH/48e5d90d2.pdf.

without any further progress, their attention is rapidly declining.⁷⁷² More importantly, there is a high possibility that if the donors do not see satisfactory efforts for the prevention of displacement by the government, this might lead them not to allocate funding to prevention efforts. If not addressed adequately, this inevitably will result in a lack of confidence in the government's response to the prevention system. One study reveals that, at the time when the government started some initiatives to address the root causes of displacement after post-election violence in 2008, IDPs believed that these positive actions were the best way to prevent future violence in their community. However, in subsequent years, there has been a noticeable shift in IDPs' support to government initiatives to protect them from the acts of arbitrary displacement. From 2008 to 2010, the number of IDPs who support government initiatives for the prevention of displacement dramatically decreased from 37% to 7% and the number of IDPs who support the prosecution of those responsible for the acts of arbitrary displacement significantly rose from 1% to 47% in the same period.⁷⁷³ This shows that when most displaced people did not see any progress in the prevention of displacement from the government, at least they chose the option of holding the perpetrators accountable as a way to protect themselves from future displacement.

It seems that the ICC shared the same opinion of the IDPs because in 2010, it began investigations into the Kenya situation. When the National Accord and Reconciliation Act was signed in 2008, it was acknowledged that to end Kenya's cycle of electoral violence and displacement, it would be necessary to address impunity for human rights violations, particularly among senior politicians.⁷⁷⁴ However, over two years, it became apparent that the government has been slow or even unwilling to fight impunity, which is considered to have been a major cause of political violence and displacement in Kenya's elections of 2007/2008.⁷⁷⁵ As a consequence of the 2007-2008 post-election violence in Kenya, the ICC charged two political figures with being criminally responsible for the acts of deportation or

⁷⁷² IDMC and NRC's Report (2012), 'Kenya IDPs' significant needs remain as intercommunal violence increases', *supra* note 705, p.1.

⁷⁷³ See Kamungi, P. (2016), 'National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya', *supra* note 720, p.251, Figures 2 and 3.

⁷⁷⁴ National Accord and Reconciliation Act No. 4 of 2008, Preamble, p.7. available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationAct_No4of2008.pdf

⁷⁷⁵ Nmaju, M.C. (2009), 'Post-election Violence in Kenya: Any Role for the ICC in the Quest for Accountability?', *African Journal of Legal Studies*, Volume 3, pp.78-95.

forcible transfer of population which amounts to crimes against humanity under the Article 7 (1) (d) of the Rome Statute.⁷⁷⁶

The intervention of the ICC shows that displacement of thousands of people in Kenya requires criminal responsibility of the perpetrators and, therefore the ICC has an important impact in making internal displacement one of the priorities of the Kenyan government and recognizing Kenya's responsibility toward its displaced population. Indeed, what has been done to protect the rights of the displaced population with the Constitutional Court's intervention in Colombia has been done with the ICC investigation in Kenya. These interventions highlight how serious the acts of displacement are considered to be, and how the causes of displacement need to be addressed. These reasons, at the same time, highlight the importance of the draft IDP Policy and IDP Act being comprehensively implemented. As mentioned above, the pending IDP policy is a limitation of the Kenyan national framework and in order to overcome the slow implementation of the IDP Act, it is essential to adopt the draft IDP Policy for a functioning response framework.

In addition to that, as mentioned previously, Kenya has a number of legal and policy frameworks that apply to IDPs in terms of preventing and addressing displacement, even if they are not IDP-specific. Having multiple frameworks that cover different aspects of displacement may seem advantageous if national institutions involved in responding to displacement operate effectively and in harmony; if not, this advantage becomes the limitation of effective implementation of national IDP frameworks. In Kenya, this seems to be a limitation, because it has been observed that the proliferation of national institutions resulted in overlapping or potentially conflicting mandates. For instance, The NCCC, the National Disaster Management Authority, the National Drought Management Authority and the Steering Committee on Conflict Management are different institutions established with different national legal instruments, and they are all responsible for monitoring risk for displacement from various causes. However, further elaboration of their exact responsibilities to prevent and monitor displacement is required, as there is no framework for cooperation between these institutions. This could ultimately represent a challenge to

⁷⁷⁶ *Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11 (charges withdrawn and the case is considered closed unless and until the Prosecutor submits new evidence) [last visited 18.05.2020]; *Prosecutor v. William Samoei Ruto* ICC-01/09-01/1 (charges vacated) [last visited 18.05.2020].

the implementation of early warning systems established in the IDP Act, because overall responsibility for monitoring risk of displacement due to various causes is not focused in one place with a holistic approach. Ensuring coherence between those established under different frameworks and the IDP Act is required for the effective implementation of prevention mechanisms. Addressing such issues will further contribute to the development of the right not to be arbitrarily displaced in Kenya with regards to implementation.

5.5. CONCLUSION

The development of a national legal framework upholding the rights of IDPs is considered part of the national responsibility of governments, and has been widely acknowledged across different legally binding instruments, and other instruments including UNGA Resolutions, HRC Resolutions, the Council of Europe's Parliamentary Assembly Recommendations and the preamble of the Great Lakes Protocol on IDPs, as well as the Kampala Convention. In this respect, a state's approach to the development of a national IDP framework for the protection of IDP rights is considered as part of their national responsibility, and therefore, different categories of national legal frameworks from different countries have been examined.

The analysis reveals that three main methods have been used to develop national laws and policies on internal displacement; (i) a national framework that addresses a specific right or covers a specific stage of displacement, (ii) a national framework that addresses a specific cause of displacement, and (iii) a comprehensive national framework that addresses all causes and/or stages of internal displacement. In terms of the prevention of displacement, the development of an IDP-specific national framework might be grouped into three categories: (i) those promoting legal recognition and respect for the right not to be arbitrarily displaced with an explicit reference to this right; (ii) those promoting the need to address the root causes of displacement, and the protection from arbitrary displacement without any explicit reference to the right not to be arbitrarily displaced; and (iii) those promoting protection from arbitrary displacement through early warning systems.

Furthermore, in order to extend the analysis with the inclusion of practical applications, this chapter enquired whether these instruments can, first, create a legal framework upholding the rights of IDPs (Benchmark 5); second, take positive steps to prevent and minimise the adverse effects of displacement (Benchmark 1); and, third, develop a national policy on internal displacement in order to raise institutional awareness (Benchmark 6). All three benchmarks were examined in the case studies of Colombia and Kenya. In each country, each of these three benchmarks can become the dominant legal process in determining the evolution of the right not to be arbitrarily displaced, and its applicability with regards to state responsibilities. Colombia and Kenya are good representatives of a comprehensive national legal framework from two different continents, as both countries' IDP-related instruments address all phases of displacement. Furthermore, they both provide a comprehensive protection mechanism in terms of preventing internal displacement, as they incorporate all three benchmarks (Benchmarks 1, 5 and 6) in their national legal frameworks. However, in practice, the following implementation issues have been observed along these lines.

First, the Colombian IDP Law developed in the context of internal conflict; it limits the IDP definition to those displaced as a result of internal conflict and generalised violence. In contrast to the Colombian IDP legislation, Kenya's IDP Act reiterates the Guiding Principles' IDP definition; it provides a broader range of reasons for becoming an IDP. However, in practice, it has some similarities with Colombia as the Kenyan government has focused on those displaced by the post-election violence of 2007/2008. This limited scope of the IDP definition also restricts the scope of the national frameworks, as public officials, non-state actors and NGOs follow these specific laws and policies to assess and identify those persons in need of protection and assistance, and there is a high risk of excluding IDPs fleeing for reasons other than political violence or conflict. This has led to the lack of efficient profiling of IDPs, and this limits the implementation of national IDP legislation because poor IDP profiling prevents an adequate estimation of the future efforts that will be necessary to design the policies on IDP protection. In order to overcome these challenges, promoting a common understanding in these countries of who is an IDP and what circumstances constitute internal displacement is important.

A second aspect is that despite the comprehensive protection mechanism established through early warning systems in order to prevent arbitrary displacement, the prioritisation of IDP returns without giving attention to the security conditions surrounding the transport of IDPs is another limitation of effective implementation. Both the Kenyan and Colombian governments have a tendency to try to make the displacement crisis invisible. For instance, the closure of IDP camps does not necessarily mean that their problems are over if the necessary conditions to facilitate their safe return are lacking. Facilitating IDP return without the guarantees of security, dignity, and voluntary return, without establishing measures to prevent forced displacement in the first place, might create multiple displacements of IDPs. In order to overcome these difficulties, it is important to promote legal recognition and respect for the IDPs' right not to be arbitrarily displaced, and to assess the root causes that might lead to displacement of people, with early warning systems and contingency planning being key parts of such assessment.

Third, in both countries, communities that have been the most adversely affected by development projects or inter-communal violence are indigenous people. Indeed, judgements of the IACrTHR concerning displaced people have specific focus on Colombian indigenous people and their tribal land rights, and the African Commission on Human & Peoples Rights dealt with the adverse effect of dispossession associated with natural resource exploitation on Kenyan indigenous people.⁷⁷⁷ In order to address protection from arbitrary displacement of indigenous people, implementation of the national legal frameworks in line with Principles 6-9 of the Guiding Principles (since these principles guide states to protect indigenous people, minorities, pastoralists and other groups with special dependency and attachment to their lands from displacement), may have particular significance to Colombia and Kenya. This process also contributes to the protection of IDPs against discrimination, as required by both countries' national IDP legislation.

Even though there are such implementation issues, the analysis of this chapter has shown how the two countries have produced comprehensive legal frameworks and provide, to some extent, the applicability of the right not to be arbitrarily displaced. This process is not

⁷⁷⁷ see African Commission on Human & Peoples Rights, 'Working Group of Experts on Indigenous Populations/Communities, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities: Research and Information Visit to Kenya' (2010), 38-42, available online at http://www.knchr.org/Portals/0/Reports/0569_ACHPR_kenya_ENG.pdf.

necessarily similar for the two countries, or other countries that may have developed comparable IDP legal frameworks. As the discussion showed, Colombia and Kenya have their own dynamics for the effective implementation of IDP laws and policies. For Colombia, accountability to domestic institutions is a critical factor for improved implementation efforts. As explained in detail in this chapter, the Colombian Constitutional Court has pushed the government to bring its law in line with the Guiding Principles. Colombia not only has created a strong legal framework, but it also has taken steps to improve its implementation with the follow-up decisions adopted by the Constitutional Court. In other words, the effect of the Constitutional Court's follow-up awards has been to bind the Colombian government to submit periodic reports to the Court, informing it about the results of the policy's implementation and the resolution of the different problems that the Court has identified. In this way, the Constitutional Court has managed to keep displaced persons visible and on the agenda. In order for Colombia to make further progress in such implementation process, awareness-raising activities and the training of responsible public officials would allow the laws and policies relating to IDPs to be more effectively implemented.

For Kenya, the government's effort towards effective implementation is reinforced by the first ever binding sub-regional instrument for the protection of IDPs, the Great Lakes IDP Protocol. In order for Kenya to make further progress in such implementation, accountability at the regional level can also be a significant factor. In substantive terms, the ratification of the Kampala Convention would create an opportunity to integrate plans to follow-through on implementation, as it provides for a mechanism of monitoring compliance and a platform for the Kenyan government to report on the progress it has made in protecting IDP rights, through the Conference of State Parties.⁷⁷⁸ These developments are clear evidence that certain factors, whether domestic or regional, can contribute to a considerable extent towards the effective implementation of national IDP legislation.

It is important to highlight that even though these countries experience limitations in the applicability of the right not to be arbitrarily displaced, this is not because of the content or

⁷⁷⁸ Article 14 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), available at: https://au.int/sites/default/files/treaties/36846-treaty-0039_-_kampala_convention_african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_africa_e.pdf

the recognition of this right, but due to challenges, obstacles and dynamics evident at the political level, such as the lack of political will and/or political stability. In other words, the legal recognition of this right is not the question anymore, but what is debated in those countries is about the political and policy-making tools that can best achieve the applicability of this right. For this reason, the challenge lies, as the two cases show, in ensuring the implementation of these existing national IDP frameworks, including the principles relating to protection from arbitrary displacement and the existing rules regarding internal displacement. Overall, the chapter shows that the right not to be arbitrarily displaced has been significantly developed under certain national legal frameworks and such development can have substantial implications towards the broader advancement of this right across national frameworks as other states may seek to follow the example set by those that have followed a more ambitious path. This process is not the same for all states as different states may develop a different ensemble of policy and legal tools. The thesis argues that despite such variations, such practices all serve to promote and eventually consolidate the recognition and applicability of this right. Finally, such a national-driven approach may allow for the re-consideration of how to approach some of the more basic and fundamental problems of international law, and how these relate to IDP protection, like the classic problem of sovereignty, as the final section will discuss.

CHAPTER 6: CONCLUSION, CONTRIBUTIONS AND IMPLICATIONS FOR INTERNATIONAL LAW

This final chapter provides a summary of the main findings of each chapter, while providing some further insights on the broader debate regarding IDP rights, sovereignty and international law. The thesis has sought to answer the central research question: to what extent has the IDPs' right not to be arbitrarily displaced been developed under national and international law?

To answer this research question, chapter 2 outlined the causes of being an IDP, and then discussed why a special category on IDPs needed to be created for these people. It examined how the definition of IDPs was born, and showed how the magnitude of the problem of internal displacement led to the drafting of an international standard for the protection and assistance of IDPs. In 1998, the Guiding Principles on Internal Displacement were unanimously accepted by the UNGA, thereby creating the first global instrument on the protection of IDP rights. The principles were gradually accepted by states, and this chapter showed that the acknowledgement of Guiding Principles gradually allowed states to reach an understanding of the existence of internal displacement and its legal challenges. The adoption of the Guiding Principles was a landmark development, following which states increasingly recognised the IDP problem within their territories and their respective obligations, whereas before that, their acknowledgement of the problem was to an extent non-existent. The chapter also showed that the Guiding Principles established the right not to be arbitrarily displaced, which was a critical development and a novel contribution to the understanding of how IDPs' rights can be protected in cases of displacement in the first place as this right addresses the prevention of displacement. While the majority of the 30 Guiding Principles were a reinstatement and reaffirmation of existing international law rules, the right not to be arbitrarily displaced could only be implicitly found under the international law of that time, so it was the Guiding Principles that explicitly created and defined this IDP right. The Guiding Principles, and especially the right not to be arbitrarily displaced, therefore covered substantial ground on how IDPs and their rights can be defined within the context of the prevention of displacement. Overall, chapter 2 showed that the right not to be arbitrarily displaced is the most innovative amongst the 30 principles, and the most critical towards the realisation of effective protection towards the prevention of

internal displacement. It also showed that the Guiding Principles initiated the development of the right not to be arbitrarily displaced at both the international and national level.

Chapter 3 demonstrated that the development of the right not to be arbitrarily displaced at the international level has legal foundations in three major regimes of international law: IHL, ICL and IHRL. The chapter showed that these legal foundations are all significant in assessing how the right and its development can be understood in the context of international law, while each of these legal foundations also functions in a distinct way in the way in which it shapes the development of the right. Under IHL, there are certain provisions, especially Article 49(1) and (2) of Fourth Geneva Convention and Article 17 of Protocol II, that arguably provide substantive rules on the prohibition of forced displacement that can be relevant and applicable to the IDPs' right not to be arbitrarily displaced. These rules cover civilians' protection from illegal acts of displacement in situations of international and internal armed conflict. Under ICL, we see the seriousness of violations of forced displacement and the need for preventing it when these acts take place in the context of internal displacement. Individual criminal responsibility for the acts of forced displacement can take many forms, such as war crimes, crimes against humanity, ethnic cleansing and inhumane acts, and ICL helps provide insight on the violations of the right not to be arbitrarily displaced. Under IHRL, the right to freedom of movement, which is embedded in Article 12(1) of the ICCPR, provides protection against displacement within national borders and provides everyone within the territory of a state the right to choose their residence. This right covers aspects of displacement, especially after displacement has taken place, and in covering the post-displacement phase, it seeks to secure people's right to return to their place of origin, their right to housing, or right to choose their residence. Overall, the relationship of the right not to be arbitrarily displaced with these three regimes is reciprocal, which means that the recognition and applicability of the right is further strengthened by the connections of the right with IHL, ICL and IHRL, while key provisions in these three regimes are enhanced when we see how they apply to cases of prevention of forced displacement when these provisions are re-interpreted through the content of Principle 6.

Chapter 4 examined what progress has been made towards the establishment of the right not to be arbitrarily displaced as a free-standing human right. To examine such progress, the chapter examined both general and specific criteria that need to be met in order for this

right to be fully established as a freestanding human right. In terms of general criteria, the chapter follows a right-based approach to show that the right not to be arbitrarily displaced fulfils some general criteria needed for the identification of a new right, such as the rights it attributes to the right holders, the obligation imposed on the duty bearers, and the conditions of lawful restriction of acts displacement by the international community. The chapter then argued that the right also fulfils specific eligibility criteria. First, the right reflects the social value of the human need to feel at home, and contributes to that by stressing that such need must be strengthened by legal protection against arbitrary forms of displacement. Second, the right is grounded on well-established IHL, ICL and IHRL rules, is consistent with these international law regimes, and its content is not repetitive but complementary. Third, the right is sufficiently precise as it generates rights and obligations, and has its own merits because it addresses the pre-displacement phase, and also provides a non-exhaustive list of conditions to assess the arbitrariness of displacement. Fourth, the right is also reflected in the general practice of states, where the numbers of state-adopted IDP laws and policies support the compatibility of this right with the practice of states with regards to IDP rights. Finally, the right has achieved recognition as an interpretation of UN Charter obligations that promote universal respect for human rights and fundamental freedoms, and which also entails implicit recognition in the UNSC, and implicit and explicit recognition in the UNGA. Based on all such evidence, the chapter concludes that these specific criteria are also met, and, overall, substantial progress has been made towards the establishment of the right not to be arbitrarily displaced as a free-standing human right.

Chapter 5 considered the extent to which the right not to be arbitrarily displaced has been applied at the national level. The chapter identifies three national methods of domesticating the Guiding Principles: (i) states that only address specific displacement phases, and recognise the need for IDPs' voluntary return, reintegration and resettlement; (ii) states that recognise certain causes of displacement, and which tend to recognise the major cause of displacement that have adversely affected IDPs (such as conflict or natural disaster); (iii) states that recognise and address all phases and/or all causes of displacement, where such comprehensive framework suggests that the right not to be arbitrarily displaced should be mostly developed in such national contexts. To further understand how exactly prevention of arbitrary displacement is addressed across these categories, the chapter conducted an

additional analysis of national IDP frameworks. It found three categories: (i) states that promote legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right; (ii) states that promote the need to address the root cause of displacement and protection for arbitrary displacement, with implicit reference to this right; and (iii) the states that promote protection from arbitrary displacement through their early warning systems. It derived from the analysis of these two categorisations that states that, first, follow the most comprehensive method of recognising and addressing all phases and/or all causes of displacement, and, second, promote legal recognition of, and respect for, the right not to be arbitrarily displaced with an explicit reference to this right, comprise the ideal category for analysing the extent of the applicability and scope of this right at the national level.

The chapter then examined two case studies that meet such standards, Colombia and Kenya, and identified how extensive the applicability of this right is within these countries' national IDP legislation. First, both Colombia and Kenya's national legislation has created a legal framework that upholds the rights of IDPs. The very adoption of the Colombian national IDP law in 1997 created the legal framework for the protection of IDP rights and attributed the right to be protected against arbitrary displacement by explicitly recognising this right through Article 2(7). Kenya's IDP legislation, called the IDP Act, was adopted more recently in 2012, where the right is explicitly provided in Article 6(1), under which the government has the responsibility to protect all humans from arbitrary displacement. Second, both countries have taken positive steps to prevent and minimise the adverse effects of displacement. Colombia's national legislation includes provisions that establish a duty to evaluate situations that can lead to displacement and mitigate its adverse effects, such as enhancing the responsibility of municipal committees in guiding communities subject to possible displacement, and identifying a list of measures to prevent forced displacement. Kenya has also seen the establishment of an early warning system that entails a prevention mechanism tasked with monitoring and reporting on populations that face risk of displacement, and issues early prevention warnings to government authorities. Third, both countries have developed a national policy on internal displacement in order to raise institutional awareness. Colombia adopted in 2005 a national plan that provides a national institutional focal point that has the responsibility for IDP registration, their local economic

development, and the provision of training to government officials. Kenya has a national plan called the National IDP Policy that was initially drafted in 2010 and promotes an understanding of the obligation of the state to prevent arbitrary displacement, and gives a detailed list of measures that Kenya needs to take to prevent displacement, and therefore helps promote the applicability of the right and helps to determine the state's responsibility in the prevention of displacement. In each country, each of these three benchmarks constitute the dominant legal process in determining the evolution of the right not to be arbitrarily displaced, and its applicability with regards to state responsibilities.

This detailed outline of the main argument of this thesis allows us to return to the main research question. The thesis enquired: to what extent has the right not to be arbitrarily displaced been developed under national and international law? The thesis argued that initially, the right not to be arbitrarily displaced was created as part of international law and embedded in the Guiding Principles. This identification of the right constitutes the beginning of its development. It was argued that the development of this right at the international level since 1998 has essentially been grounded in three fundamental regimes of international law, IHL, ICL and IHRL, because this right builds upon existing provisions of these regimes but also fills gaps in these regimes regarding IDP-specific protection. It was then argued that the right not to be arbitrarily displaced was developed as a free-standing human right by meeting both general and specific conditions required, which meant that this human right is applicable at both the national and the international level. However, only some states have developed a comprehensive national framework that promotes legal recognition and respect of the right not to be arbitrarily displaced with an explicit reference to this right. In the two case studies, Colombia and Kenya, the applicability of the right was promoted by the creation of a legal framework upholding the rights of IDPs, the formation of positive steps to prevent and minimise the adverse effects of displacement, and the development of a national policy on internal displacement in order to raise institutional awareness. Overall, the thesis argued that the development of the right not to be arbitrarily displaced was initially framed and identified under international law, but gradually some states became more ambitious with regards to the recognition and applicability of this right. This thesis therefore concludes that the right has a tendency to develop progressively at the

national level, a process that is more advanced than the international level, meaning that the development of this right is now driven from the national level to a significant extent.

6.1. Contributions

The answer provided above on the central research question allows this thesis to speak to some of the broader debates concerning the rights of IDPs, but also key areas of international law in general. The thesis argues in this final section that the insights gained from the examination of the development of the right not to be arbitrarily displaced are relevant to the academic study of IDP law, and study of international law that is linked to the protection of IDPs, and the study of fundamental challenges of international law, including the boundaries of sovereignty.

First, the thesis shows that in the field of IDP protection, an area that is less explored, defined and clarified is the prevention of internal displacement. The displacement problem is not seen as a proactive policy-making area but rather one where states perceive in a reactive way what displacement has happened and when it has happened. However, the pre-displacement phase is a major area concerning the challenges faced by IDP people, even though there is no established or common legal obligation, since this area is often ignored by court decisions and states. In the established legal understanding of the broader IDP condition, the focus is always on the post-displacement phase. Even when post-displacement is addressed, the preoccupation of states and of the international community is mostly with IDPs' return to their home, without giving any satisfactory assessment of the conditions inherent to their situations. This lack of appropriate assessment often leads to multiple displacement. We can therefore observe that internal displacement comes into the international agenda after human rights have been repeatedly violated. This thesis changes this perspective as it argues that before displacement happens, there are signs that a potential displacement situation may deteriorate. This thesis seeks to re-focus the attention to the first phase, which is arguably the most affected area. If we provide clear guidance on states' responsibilities, obligations and understandings on how to prevent displacement, and especially within the context of the right not to be arbitrarily displaced, then we can establish rules and decisions that will be clearer, more feasible and more effective.

Second, the thesis makes a contribution by placing the right not to be arbitrarily displaced at the centre of our understanding of how to best protect IDPs. In this respect, the thesis provides a new perspective of the role of this right within the Guiding Principles and international law, where this right can gain a greater significance in how the Guiding Principles can be operationalised, and in how different regimes of international law can be mobilised to protect IDPs. This right gives us the threshold of what amounts to an arbitrary act of displacement. Defining the arbitrariness of displacement allows for revealing and identifying the unlawful aspects and acts of displacement. Through this right, we can understand the nature of the violations and the extent to which these are deliberate or a result of negligence. The capacity of this right to reveal unlawfulness and contribute to a more advanced understanding of arbitrariness and its implications has not been examined sufficiently in the literature to date. Therefore, many analyses of IDPs miss the violation of the right to protection from displacement. They deal with other dimensions, such as how humanitarian assistance needs to be provided, but they omit the initial responsibility to address the root causes of displacement. The omission of this right in IDP studies becomes evident when we look at the coverage of various types of displacement. The types of internal displacement that are associated with conflict situations or development projects often comprise situations where internal displacement is used as an intentional target by states. In such cases, states use the condition that might lead to displacement as a shield for their unlawful acts. Internal displacement, however, is not a by-product of external conditions but an objective of state acts. But when we look at different cases, states claim that there is another reason that made them allow for displacement to happen, sometimes taking advantage of gaps under international law and of vague understandings of what amounts to arbitrary displacement, therefore avoiding accountability and responsibility. This is why we need a clear set of rules to determine what is arbitrary. If we define arbitrary displacement, we can then directly point to the situations where states are engaging in unlawful acts, exactly because we can determine what constitutes arbitrariness. The general process of clarifying and defining arbitrariness is where the right not to be arbitrarily displaced contributes to, and it is exactly the potential of this right that this thesis seeks to stress and highlight when addressing the broader field of IDP protection.

Third, this thesis delivers a contribution to our understanding of the importance of the national level in driving forwards the development of the right not to be arbitrarily displaced, and in this respect, the thesis provides an insight that helps us rethink and re-evaluate how national legal framework can strengthen IDP protection. The thesis showed how national IDP frameworks can initially be shaped by principles at the level of international law but subsequently gain a dynamic of their own and even become more advanced than the international level. The qualification here is that not all states can necessarily achieve this level of advancement, but we nevertheless saw that a critical mass of states (the 34 states identified in chapter 4) did manage to attain a meaningful level of commitment toward the recognition of this right. This national-driven process has not been explored in the IDP literature, which has not carefully looked at the various states that have implicitly and explicitly recognised the right not to be arbitrarily displaced. As this thesis has discussed, the literature does not provide an analysis of states' approach to the recognition of this right. This observation of a lack of analysis of how national frameworks embed and reinforce the right not to be arbitrarily displaced also then potentially raises interesting questions about how IDP rights are established. When we look at established IDP rights, we can re-assess what was the agency generated by the national and international level. Also, if we look at new IDP rights that might emerge, this thesis also raises important questions on what the role of national frameworks should be. As far as the right not to be arbitrarily displaced is concerned, this thesis provides a new perspective on how the national-driven approach seem to be a more a pragmatic, realistic, efficient and effective framework for IDP protection. The two case studies of Colombia and Kenya show how states might take different paths to developing enhanced national IDP frameworks and how their positive steps might include a wide range of mechanisms of promoting the applicability of this right, i.e. early warning systems. Even though these countries experience limitations in the applicability of this right, this is not because of the content or the recognition of this right, but due to challenges, obstacles and dynamics evident at the political level, such as the lack of political will and/or political stability. In other words, the recognition of this right is not the question anymore, but what is debated in those countries is about the political and policy-making tools that best achieve the applicability of this right.

These three contributions on the pre-displacement phase, the critical importance of the right not to be arbitrarily displaced and the significance of the national level in the development of this right, lead us to re-consider some key questions on the relationship between sovereignty, international law and IDP protection. The concept of state sovereignty, a fundamental norm of international law, is always at the core of the discussions of how best to protect IDPs. The protection of IDPs raises important questions regarding the possible limits upon sovereignty through international responsibility, because IDPs have not crossed any international boundary into another state; they remain under the jurisdiction of their own State but face grave humanitarian problems that are difficult for the international community to ignore. The Guiding Principles explicitly mention, in Principle 3, that national authorities have the primary duty to provide protection and assistance to IDPs.⁷⁷⁹ This principle is in accordance with the national-driven approach of IDP protection discussed in detail in chapter 5. In that detailed empirical analysis, the thesis argued that each country which produces national IDP frameworks accepts the national responsibility to provide protection and assistance, even if they have limited national IDP frameworks initially. Such acceptance derives from their national obligations and is not imposed by an international legally binding instrument. This is because states' sovereignty is respected so states do not need to face enforcement from the external environment but willingly devise their own mechanisms.

The idea that sovereign statehood entails a responsibility to protect populations from grave violations of human rights has been increasingly accepted by the international community since it was first articulated by Francis Deng as 'sovereignty as responsibility' to protect IDPs. The notion of sovereignty as responsibility is framed as radical departure from the traditional conception of sovereignty: 'if [governments] fail to discharge the responsibilities of sovereignty, whether through the state or alternatives to it, they cannot legitimately complain against international humanitarian intervention or against its withdrawal and neglect.'⁷⁸⁰ From then on, the argument on how IDPs should be protected is heavily relied on the international community's responsibility to protect these people. IDPs are a good example that demonstrates the debate between sovereignty and international responsibility

⁷⁷⁹ Principle 3(1) of the Guiding Principles.

⁷⁸⁰ Deng, F (1996), 'Sovereignty as Responsibility: Conflict Management in Africa', *supra* note 15, p.23.

because they remain within the domestic jurisdiction of their governing state but face grave humanitarian problems that are difficult for the international community to ignore. It is argued that sovereignty carries with it a responsibility; the legitimacy of a government is inextricably linked with the fulfilment of that responsibility.

This approach of reconciling sovereignty with responsibility is described as responsible sovereignty, and has two dimensions, internal and external. The internal dimension requires that at a minimum a state should guarantee basic health services, food, shelter and other essentials. Therefore, when states are incapable of discharging those responsibilities, they cannot claim sovereignty in an effort to keep the outside world from stepping in to provide assistance and protection. The external dimension of responsible sovereignty stems from the threats to regional stability and international peace and security. However, one of these two fundamental dimensions of responsible sovereignty – national responsibility to prevent internal displacement, and therefore the human rights violations occurring as a result of this – has received inadequate attention by both scholars and legal experts. The primary focus should be on a positive vision of sovereignty, where external protection aims to strengthen domestic capacity and prevent crises in the first place, rather than emphasising humanitarian intervention. The concept of national responsibility to protect includes measures to prevent such human rights violations from occurring, to respond when they do occur and to support rebuilding after they have ended. The establishment of the understanding of the national dimension of responsible sovereignty is crucial for mitigating the adverse effects of displacement when displacement is primarily internal because it seems to take far longer to generate an international response. The national level of commitment is essential for the implementation of IDP-related instruments at the national, regional and international level as it underscores the recognition of IDP's rights by their own state and is a concrete expression of their responsibility to protect these rights.

The concept of sovereignty has directly affected both the practice of states and the development of international law, hence has an impact on understanding the development and applicability of human rights. The concept continues to evolve through the articulation of norms relating to the protection of human rights in treaties and other normative instruments. As a result, states and international organisations have begun to consider restructuring the traditional idea of state sovereignty. When it comes to discussions of how

to best to protect IDPs, the potential tension between the traditional concept of state sovereignty and the need to protect the rights of IDPs have become apparent as states have been reluctant to internationalise the issue of IDPs by declining to adopt stronger international norms. This is where the national adoption of IDP frameworks is useful as their adoption shows the willingness of the government to take steps for the protection of IDP rights rather than an obligation being imposed by an international treaty. The more innovative aspect of developing a national instrument is to test how Guiding Principles are being invoked in support of state practice, and how these can be mobilised towards the effective implementation of these national IDP frameworks. In this way, it is advantageous to allow states to adjust their expectations in accordance with changing understandings of sovereignty. As they pursue such process, states may tacitly recognise their responsibility to protect IDPs before they agree to the explicit recognition of similar rules in treaty form. Indeed, this bottom-up approach is clearly seen in the recognition of the right not to be arbitrarily displaced.

This thesis identifies the advantages of the national-driven approach, and helps open up a broader discussion on how international law can be perceived with regard to the protection of IDPs. Such perspective suggests that aligning national and international law is feasible and even desirable and shows that national and international law regarding IDPs are not contradictory but can be complementary. Even though the possibility of further advancement of International IDP law was not a central focus of the empirical research of this thesis, it has nevertheless being suggested that the national driven approach allows and potentially encourages a more international treaty in the future. One path towards this direction is to witness an increase in the number of states that willingly decide to adopt more comprehensive national IDP frameworks, therefore leading to a critical mass of state actors in favour of an explicit endorsement of the right not to be arbitrarily displaced. Further academic research can concentrate on the multiple developments that unfold across national contexts in order to trace and capture any significant developments taking place with regard to this right. As this thesis has shown, significant developments have already taken place, and these demonstrate that the process of explicitly endorsing the right can include different paths, whether constitution-driven or policy-driven. Of course, these processes are not mutually exclusive. The initial trigger of the national-driven approach may

indeed derive from an international or regional convention. However, we have seen in some countries that this initial trigger, which leads to the development of a basic national framework, gradually gains a dynamic of its own and becomes an autonomous legal process. When that process develops and delivers more ambitious targets of IDP protection, and of the right not to be arbitrarily displaced specifically, we then see the value and capacity of the national-driven approach. The analysis of this thesis acknowledges that many states are sensitive about their IDP situations and would want to deflect international community's involvement. One way of addressing those sensitivities around sovereignty, is to foster an understanding of the rights of IDPs within the institutions of that state, which is not imposed by the international community but is rather generated willingly by domestic actors on a more flexible basis.

In terms of future research, this thesis acknowledges that questions about state sovereignty may also arise where a government is unable or unwilling to provide protection for IDPs. This situation raises legal and political dilemmas regarding the need to protect the rights of IDPs. Should sovereignty be absolutely respected under all conditions, and should IDPs be excluded from external protection, or are there any instances in which interference in a state's internal affairs become the international community's responsibility? In other words what is the role of the international community - international organisations, non-governmental organisations and other states - in providing protection and assistance to IDPs? This may not be an issue where the State is willing to accept such involvement; the real challenge lies in assessing what happens when the State asserts, on the basis of its sovereignty and exclusive jurisdiction, that the international community has no legal right or obligation to become engaged. This is an area where further study will possibly contribute towards the better protection of IDPs. This thesis has attempted to provide a starting point towards this direction as the national perspective that has been the main contribution of this thesis can also lead to a better understanding of the international perspective.

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